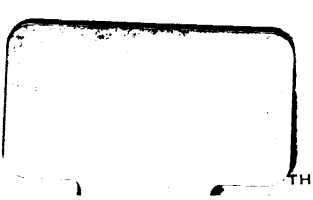

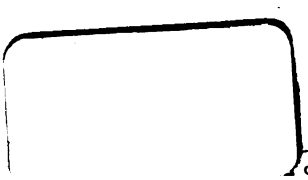

A

TREATISE

ON THE

EQUITABLE DOCTRINE

OF THE

CONVERSION OF PROPERTY.

By J. H. LEIGH AND R. DALZELL, ESQRS.,

OF LINCOLN'S INN, BARRISTERS AT LAW.

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PREFACE.

AMONGST the various treatises which have appeared on detached heads of law, none seem to have embraced the present subject, although of increasing importance to the public, and not without some difficulty to the Profession.

In a state in which the law applicable to real and personal property is extremely different, when money is directed to be laid out in land, or land to be sold for the purposes of distribution, these intentions might be considerably embarrassed, or, possibly, never carried into execution, unless the rigour with which the Common Law regards these two species of property, were relieved by an equity deducible from the principles of moral justice; but as the decisions on this branch of equity are widely diffused throughout the Chancery Reports, the distinctions between the cases rather minute, and the principles on which the distinctions are founded, seldom occur in any Treatise on Law, never in any connected point of view, a work treating exclusively on the subject might not be considered unacceptable to the Profession.

Although these are only reasons why such a work should be undertaken, they are none why the authors themselves should have undertaken it: diligence in collecting the cases from a long series of reports—in deducing the abstract principles on which they are decided—and classifying them so as to give consistency and regularity to the whole—are their only merits, if such that can be called which is but an indispensable duty; and while it is hoped that no deductions have been advanced, which the facts of the cases, and the decisions upon them, do not fully authorize, it may be confidently asserted, that no case has been purposely withheld, as contradictory to any proposition stated in the following pages.

How far success has crowned these exertions, it is for that Profession to which this work is, with the utmost deference and apprehension, now offered, to decide, from whose accuracy and discernment, though neither any imperfections, nor the causes of them can remain unperceived, yet, from whose candour and liberality, some indulgence for them may be expected.

LINCOLN'S INN,
24th November, 1825.

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A

TREATISE

ON

THE LAW

OF

THE CONVERSION OF PROPERTY.

CHAPTER I.

ORIGIN AND DEFINITION OF CONVERSION, &c.

THE learning of Equitable Conversion is highly interesting, as involving consequences of great importance to the community at large, the whole doctrine of which, though subject to very refined and subtle distinctions, is reducible to some of the most just and simple principles on which the jurisprudence of our courts of equity has been formed.

Since equity looks upon things agreed to be done as actually performed,(*a*) Equitable Conversion may be *defined to be, [*2] "That change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such."

Hence it is evident, from this maxim and definition, that this conversion is entirely dependent on the purpose; so much so, indeed, that even if the property when converted be more than requisite for the completion of the purpose, then in the eye of equity this surplus will (in its first transmission) pass as if it had never been converted.

This latter part of our conclusion is only true, however, where the conversion has been effected by means of the actual owners of the property; for if it be effected by persons entitled in *auter droit*, the nature of the property continues to remain (unless under some peculiar circumstances, of which we shall hereafter more particularly treat,) in its converted state, for as to that, the maxim in equity applies, "*fieri non debet sed factum valet.*"

It was not until about the time of Charles II. that we find these principles, though of strict justice, generally acted on in the courts of equity,

(*a*) Francis's Maxims, Max. 13.

and giving the property intended by the owners to be converted for any purpose a character entirely different from that which it had in fact.(*b*)

The consideration of this subject will resolve itself into several distinct branches; in reviewing which we shall first ascertain the means by which the conversion of realty into personalty is constituted, and, *vice versâ*, the circumstances under which some of those means [*3] *have obtained, and the necessity of an explicit declaration when there is any direction to convert property: in the next place, we shall be led to consider the period from which this conversion may be supposed to commence, a question chiefly arising under wills directing a conversion of property; and from thence our attention will be directed to the various consequences arising from a conversion of property, whether of personalty into realty or of realty into personalty, the effects of various statutes upon property in a state of conversion, the means necessary to be employed by persons entitled in *auter droit* to convert property, the extent of those means, and the consequence of such a conversion: we shall then consider what may be deemed a reconversion; what will amount to a sufficient expression of intention to reconvert property; who are capable, or capable only to a modified extent, of expressing such intention; and we shall conclude by a review of the statutes facilitating this disposition to reconvert, and of the various cases interpreting the effect of these statutes.

[*4]

*CHAPTER II.

OF THE MEANS BY WHICH A CONVERSION MAY BE EFFECTED.—NECESSITY OF AN EXPLICIT DECLARATION IN THE APPLICATION OF THEM.—RELATIVE OR CONTINGENT CONVERSION, &c.

As personal estate is often required to be laid out in land not immediately to be procured, either for the purpose of family settlements or the accumulation of landed property, and real estate to be turned into personal, either for the purposes of division or payment of debts, &c., equity, until the property has actually been purchased in the former instance, or disposed of in the latter, will consider it in such a state of conversion as to exempt it from the laws to which it would be liable in its actual state, and subject it to the laws of that species of property into which it is intended to be converted, in the present chapter we shall take into our consideration the various means by which the conversion of property may be effected.

It was observed by the Master of the Rolls, in the case of *Fletcher* v. *Ashburner*,(*a*) "that nothing is better established than this principle, that money directed to be employed in the purchase of land, and land direct-

(*b*) Lawrence v. Beverleigh, 2 Keb. 841, seems to be one of the earliest cases.
(*a*) 1 Bro. C. C. 497.

ed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction was given; whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or *only covenanted to be paid; whether the land is actually conveyed or only agreed to be conveyed; the owner of the fund or the contracting parties may make land money, or money land." And it is likewise immaterial whether the money intended to be converted be deposited in the hands of trustees to be invested, whether there is no such deposite, but a man covenants to lay out so much money in land and settle it, or whether it is neither in the hands of trustees, nor secured by covenant, there is no difference in reason, for the nature of the thing is changed by the agreement, of which it is the business of a court of equity to enforce the execution.(*b*) [*5]

These, then, are the means by which in the eye of equity the absolute owners of property may effectuate that conversion which gives to realty the character of personalty, and to personalty the character of realty, but as the conversion, by will, of real estate into personal for the purpose of an equitable administration of the testator's debts was not at first very readily allowed, it may not, perhaps, be considered as irrelevant to our subject in the present place to deduce the mode by which real estate gradually became convertible by will into equitable assets.

A testator desirous of converting his real estate into equitable assets for the payment of debts, devises it either to a trustee solely, or to a trustee who is also executor, or creates a charge upon it; all these means are equally efficient, as every devise of lands for payment of debts by which the descent is broken, or even intended to be broken, or by which a quantum of interest, which otherwise would have gone to the heir, *is withdrawn from the mass, is a conversion of land into equitable assets. [*6]

Prior to the statute of fraudulent devises, where a devise was made to trustees not likewise executors, for the payment of debts generally, as the money never came into the hands of the executors no action lay, and it was therefore necessary that creditors should come into a court of equity for satisfaction of their debts: such a devise, therefore, for payment of debts coming under the cognisance of equitable jurisdiction, which was not tied down by any rule of law, a new method of administration was introduced upon the grounds of justice, and the principles of equality, all debts being in conscience of equal importance; and, therefore, as the testator had made no distinction between his specialty and simple contract debts, but had devised his real estate for the payment of his debts generally, equity would not make that distinction which the testator himself had not made.

Nor could this equitable proceeding have caused the least injustice to the specialty creditors, for at that time the testator might have defeated his creditors' claims by devise, or if the lands had descended to the heir, the heir might equally have defeated them by alienation. Hence we find, that in the case of *Wolestoncroft* v. *Long*,(*c*) it was declared to be the constant practice, that all the debts should be paid in proportion, and

(*b*) Lechmere v. Carlisle, 3 P. Wms. 211, S. C. Forr. 80.
(*c*) 1 Cha. Ca. 32.

that if the lands were not sufficient to pay all, all should lose in proportion; and so, also, it was subsequently declared, that when a man settles his lands for payment of his debts generally, all his creditors are equally concerned and entitled, and none is to be preferred before another; and
[*7] *debts without specialty are equally to be regarded as debts by specialty.(*d*)

This equality of claims was as much the general wish of mankind, as it had been the established doctrine of courts of equity; for although by the statute of fraudulent devises,(*e*) which has been called a parliamentary approbation of equitable assets,(*f*) it is enacted that "all wills or testaments, limitations, dispositions, or appointments of lands or tenements, &c., whereof any persons, at the time of their decease, shall be seised in fee-simple in possession, reversion, or remainder, or have power to dispose of the same by their last wills, shall be deemed and taken (only as against creditors by bond or specialty binding the heir) to be fraudulent and void; and every such creditor shall have his action of debt, upon his and their bonds and specialties, against the heir at law of such obligors, and such devisees jointly," yet the proviso operates by way of exception upon devises for the payment of debts, and excepts such devises out of the act, and places them in the same situation as before the passing of the act. "Provided always, that where there hath been or shall be any limitation or disposition of lands or tenements, for the raising or payment of just debts or portions for children, other than the heir at law, in pursuance of any marriage-contract or agreement in writing *bonâ fide* made before such marriage, the same and every of them shall be in full force."

[*8] *So that at length where the trustee was not executor it was determined, as well upon the principles of equity as upon the sanction of the legislature, that a devise of lands to him for payment of debts should constitute equitable assets.

But this equitable administration of assets was not so readily obtained, where the testator had united in the same person the offices of trustee and executor.

It is laid down in Co. Litt. 113 *a*, that whether there is a bare trust given to the executors, or a trust coupled with an interest, in both cases the executors may sell for payment of the testator's debts; and although the value of the land could not be given in evidence, as assets at law in the executors' hands,(*g*) it was formerly decided that lands in the hands of executors were legal assets, and consequently that all debts must be paid in a course of administration. In the case of *Girling* v. *Lee*,(*h*) it is said, that if the devisee of the lands in trust for payment of debts be also made executor, then do the lands so devised become legal assets, and the debts must be paid according to their precedency or superiority at common law: this was followed by many other cases(*i*) upon the same grounds; the authorities, indeed, were so uniform as almost to destroy the equitable distribution of assets aimed at by courts of equity;

(*d*) Anonymous case, 2 Cha. Ca. 54.
(*e*) 3 & 4 W. & M. c. 14, made perpetual by 6 & 7 W. 3. c. 14.
(*f*) Silk v. Prime, cited in Bro. C. C. 138. (*n*)
(*g*) Hawker v. Buckland, 2 Vern. 106. (*h*) 1 Vern. 63.
(*i*) Anonymous, 2 Vern. 133. Greaves v. Powell, 2 Vern. 248. Cutterback v. Smith, Pre. Cha. 127 Bickham v. Freeman, Pre. Cha. 136.

but, however, at length the real estate devised under such circumstances was regarded in equity merely as a trust-fund, and consequently subject to an equal distribution among the creditors; for in an early case(*k*) where the *devisees of the real and personal estate were [*9] made executors, on its being stated by counsel to be a settled distinction in equity that they ought to apply the estate in such case in a course of administration, because, if the estate were sold, it would be personal assets in their hands, and then to pay a debt of an inferior nature before one of a superior would be a devastavit, the Lord Chancellor thought the accident of their being executors ought not in equity to make any difference, but that all the creditors should be considered equally.

And again in the case of *Lewin* v. *Okely*,(*l*) where there was a devise to trustees for the payment of debts, and the same persons were made executors, the court said, the assets should, *notwithstanding*, be equitable, and *not legal*, and all the creditors should be paid *pari passu*; so that the old rule, where the trustees and executors were the same persons, was by these equitable decisions completely subverted, and even if the executors take but a bare power, equity will administer the assets equally,(*m*) for it is immaterial, as we shall see hereafter, whether the descent be broken or not, and it is the wish of a court of equity that the division shall be made *pari passu*; nor will there be any difference in the construction when the lands are devised to the executors and their heirs, for, as Lord Camden says,(*n*) the case will be the same whether the land is devised to them, or to them and their heirs, for in both cases they are equitable trustees. The *descent is broken*, and the specialty creditors have lost their fund; nor is it reasonable to suppose that a man who does repeatedly *and anxiously provide for the payment of all his [*10] debts, could mean, by legal preference, to pay some only, and leave the rest unpaid. The power is lodged not in executors solely, but in them and their heirs; and since it is clear that the money could never be assets in the hands of the executor's heir, nor could the creditor ever maintain his action against such heir,(*o*) the word heirs will then have a useful meaning, as it must imply that the executor should be likewise trustee, and consequently the assets will be subject to an equitable distribution.

Lord Thurlow seems to have compared it to the case of a trustee, considering the heir a trustee; and upon this reasoning, that if the estate was devised to trustees (in which case it would be clearly equitable assets,) and the trustees died in the lifetime of the testator, and the heir took by descent, yet a court of equity would hold him a trustee quoad the debts, and quoad that purpose the estate in him in the nature of a trust; and, therefore equitable assets.(*p*)

It was in like manner formerly considered,(*q*) that a mere charge of lands for the payment of debts did not, as they descended to the heir,

(*k*) Challis v. Casborn, Pre. Cha. 407.
(*l*) 2 Atk. 50.
(*m*) Newton v. Bennet, 1 Bro. C. C. 134. Barker v. Boucher, cited in note (ibid.)
(*n*) Silk v. Prime, cited 1 Bro. C. C. 138, n.
(*o*) Et vide Newton v. Bennet, 1 Bro. C. C. 135, and Barker v. Boucher, in note. 1 Bro. C. C. 140.
(*p*) Bailey v. Ekins, 7 Ves. 322, and Shiphard v. Lutwidge, 8 Ves. 26.
(*q*) Freemoult v. Dedire, 1 P. Wms. 429. Plunket v. Penson, 2 Atk. 290.

convert them into equitable assets, for the descent was not broken, yet in the present day the contrary and more equitable doctrine prevails; for although a charge is no legal interest, nor, therefore, strictly speaking, a devise, yet it has been held(*r*) to be that declaration of intention upon which a court of equity will fasten, and draw out of the mass
[*11] *that quantum of interest which would be sufficient to discharge the debts, and which otherwise would have gone to the heir. Then as the statute under the proviso before-mentioned authorizes an efficient provision for the payment of debts, this charge on the estate will put the specialty and simple contract creditors on an equality, and will not come within the fraudulent disposition guarded against by the statute; and, therefore, Lord Hardwicke held(*s*) an estate charged by will with the payment of debts, though it descended, subject to the charge, to an infant heir, to be equitable assets, and to be the same as if it were devised to be sold, though the descent was not broken; for it descended subject to a trust for the creditors; and he decreed that it should be sold and the infant should convey when of age, unless he should show cause to the contrary. So, likewise, Lord Thurlow held(*t*) that a devise to the heir to sell, would make the produce equitable assets; and a charge was a devise *pro tanto;* and this doctrine has received the greatest approbation from Lord Eldon;(*u*) for his Lordship has relied upon the last-mentioned authorities, and considered, that a charge for payment of debts was a complete conversion of the estate into equitable assets, and that the creditors by specialty had thereby lost their fund.(*v*)

Hence, if there is in a will a charge for payment of debts, it is immaterial to inquire, whether the descent of the estate is broken, or not; as it appears, that, as well upon principle as upon the most approved authorities, *a charge will be a sufficient conversion of the estate into
[*12] equitable assets.

Nor does it appear, indeed, that the true question at any time is, whether the descent is broken; for as Lord Eldon says,(*w*) the rule cannot be accurate, when it is stated, that the descent ought to be broken. It would be more accurate to state it thus; that it must appear upon the will, that the testator *meant the descent to be broken;* for suppose a devise to trustees, in trust to pay debts, and all the trustees dying in the life of the testator the estate to descend upon the heir, would not that be equitable assets? By the failure of the devise the heir must have had it, as the trustees would, subject to the debts; and yet the descent is not broken, but intended to be broken. The death of trustees is immaterial, where there are persons living who may apply to have the trusts carried into execution; and where a devise is executory, the heir is compellable to carry the trusts into execution,(*x*) as when the trusts are meritorious the court always considers that they exist, though the trustee is dead.

Under the proviso before alluded to, the trustees may raise the money

(*r*) Bailey v. Ekins, ubi supra.
(*s*) Hargrave v. Tindall, 1 Bro. C. C. 136. n. Lingard v. Earl of Derby, 1 Bro. C. C. 311. Hughes v. Doulben, 2 Bro. C. C. 614.
(*t*) Batson v. Lindegreen, 2 Bro. C. C. 94.
(*u*) Bailey v. Ekins, 7 Ves. 322.
(*v*) Vide 8 Ves. 30, and the note there.
(*w*) Bailey v. Ekins, ubi supra. (*x*) Burgess v. Wheate, 1 Eden, 177.

either by mortgage or by sale, without waiting any decree of a court of equity, which does not give rights, but only executes the trust and power reposed in them ;(*y*) and although it has been attempted(*z*) to be maintained, that a devise for payment of debts, whether effectuating that purpose or not, was sufficient to take the will out of the statute, and the creditor could only come in as directed by the will, yet *that has been subsequently overruled, and it is now necessary [*13] that the devise provide for the payment of debts in a practicable and efficient manner, otherwise the statute will apply ; for in the case of *Hughes* v. *Doulben*,(*a*) where a testator made a general charge of his debts, upon his real estate, exempting his personalty from the payment thereof, and then devised a particular estate to trustees for that purpose, "excepting his capital mansion-house," the decree was, that the devised trust-estate should be sold for the payment of debts ; and the Master sold the whole devised trust-estate, not excepting the mansion-house ; but upon its being referred to the Master to consider whether a good title could be made, he reported that there could not be a good title made to the mansion-house ; and on an exception to the Master's report the Lord Chancellor delivered the following opinion : "As to the case that has been mentioned,(*b*) if it is only meant to determine that the inconveniency of the mode prescribed by the testator for the payment of his debts would not bring it within the statute of fraudulent devises, provided the fund was *ultimately sufficient*, I agree with that case ; but if it was meant to be laid down, that even though by the mode prescribed the fund would turn out ultimately insufficient for the purpose, I never can accede to that. Whenever such a case comes before me, I will refer it to the Master to state to me, whether, according to the mode prescribed by the testator, the debts could be paid ; and if the Master tells me that the debts cannot be paid by this mode, I will consider this as a *fraudulent devise, until I am controled by the House [*14] of Lords. I wish that whoever decided the case of *Lingard* v. *Earl of Derby* had gone to the length of declaring, that although the fund, as directed to be applied, appeared to be insufficient for the purpose, yet because there was a devise for payment of debts, the bill should be dismissed, in order to have the point properly discussed. For my part, I never will give in to that doctrine, until I am compelled to it by the highest authority."

Hence, under every devise for payment of debts, where the descent is broken, or intended to be broken, or where there is a charge, and the heir does not take as he would if that charge had not been made, the lands will be converted into equitable assets.

As the specialty creditor under the third clause of the statute has his remedy at law against the heir of the obligor, if a trust-estate descend to him, this will become legal assets, and not equitable, although the heir may be compelled to go into a court of equity to obtain a conveyance of the legal estate;(*c*) and if there is a reversion in fee left in the mortgagor of a term of years, this reversion descending will be legal assets, for the

(*y*) Lingard v. Earl of Derby, 1 Bro. C. C. 311.
(*z*) Earl of Bath v. Earl of Bradford, 2 Ves. sen. 590.
(*a*) 2 Bro. C. C. 614, and 2 Cox. Ca. Ch. 170.
(*b*) Alluding to the case of Lingard v. Earl of Derby, before referred to.
(*c*) Plunket v. Penson, 2 Atk. 290.

bond-creditor may have judgment against the heir of the obligor, with a *cesset executio* during the term ;(*d*) and so likewise if the reversion in fee be expectant upon an estate for life ;(*e*) but where there is an equity of redemption of a fee, or of a term of years, where the mortgagor is only the termor, such interests will be considered as equitable assets.(*f*)

[*15] *Thus did land, by a slow and gradual process, become generally convertible by will into personalty for an equitable administration of the testator's debts.

It is not within the scope of the present treatise to enter into the various questions that might arise, with regard to the validity of the sale of lands, when made under certain circumstances by executors, or to attempt an investigation of the constructive means by which their power to sell may be constituted, or under what circumstances that power may or may not survive, &c.; the object of that part of the present work relating to the conversion of real estate into personal, is rather with reference to that part of the land if unsold, or of the produce of it, if sold, which in the event has not been required for the purposes originally specified.

It might be proper, here, however, to remark, that in order to make the various means before-mentioned of converting property effectual, it is essential that the direction to convert be positive and explicit,(*g*) that the will, if it be by will, or the deed, if it be by contract, decisively and definitively fix upon the money the quality of land.(*h*)

If, then the character of the property be no longer doubtful, and it no longer remains *ad arbitrium*, whether the quality of personalty be imperatively and definitively fixed upon realty, and *vice versâ*, equity will consider the one or the other as that species of property into which it is directed to be converted ; for it is upon this circumstance that all the decisions are grounded.(*i*)

[*16] *But although, in the conversion of personalty into real estate, the direction to lay out money in land be not so explicit as to give it absolutely the qualities of real estate, yet if in the deed there be the limitation of a place, as a county or parish, such a circumstance will unquestionably be considered sufficient to afford evidence of an intention to impress the fund with real qualities, and clothe it with real uses, the moment the deed is executed.(*k*)

And it has been held, where money is, *after the request of husband and wife*, to be laid out in land to be settled in strict settlement, *with power for the husband to jointure*, that, as the limitations are strictly applicable to real estate, the words after request seem intended more to insure the act being done when the request is made, than to prevent it until made ; and, therefore, the fund, though not invested in land at the death of the husband and wife, nor any application for that purpose made by them to the trustees, will be considered as land and not money.(*l*)

(*d*) Plunket v. Penson, 2 Atk. 290. (*e*) Anonymous, 2 Vern. 405.
(*f*) Plunket v. Penson, 2 Atk. 290. Deg v. Deg, 2 P. Wms. 412. Coxe's case, 3 P. Wms. 342.
(*g*) Symons v. Rutter, 2 Vern. 227. Curling v. May, cited in Guidot v. Guidot, 3 Atk. 255.
(*h*) Walker v. Denne, 2 Ves. jun. 170. (*i*) Ibid.
(*k*) Wheldale v. Partridge, 8 Ves. 237.
(*l*) Thornton v. Hawley, 10 Ves. 129.

And even if the circumstance of the limitation as applicable to real estate, had been wanting, it would appear, that the trust-fund would equally have been considered as stamped with real uses.(*m*)

Nor is it absolutely necessary that the conversion of personalty into realty be effected within the time specified for that purpose, as a court of equity will dispense with that circumstance; yet it is the duty of the trustees to call on the parties to lay out the money and *make [*17] the purchase;(*n*) and even if the consent of the parties interested in the purchase is not, in consequence of their death, or by any other means, to be obtained, yet still the injunction to lay out the money will not be the less binding on the trustees; for as it ought to have been laid out, so it shall be considered as actually invested in a purchase;(*o*) and as the money is to be laid out in the purchase of lands, it is not sufficient that a trustee deposite it in the hands of his banker, but he must actually make it productive;(*p*) for if it had been disposed of in lands there would, at least, have been the rent of the lands, and no one should suffer from the laches of the trustee.

But there is no objection why, although money is directed to be laid out in land, there should not appear an intention that, until the money is laid out, it shall be considered as unconverted, and follow the course of personal estate;(*q*) and where money is directed to be laid out in land, *or* invested in government *or* other securities, if the Court finds it in the state of personalty it will be decreed as such;(*r*) but if any part of it has been once invested in land which has been sold, and the purchase-money reinvested in stock, that stock will be considered as real estate, and not personal.(*s*)

When, however, money is directed to be laid out in the purchase of lands *or* very long terms of years, the Crown has no equity on a failure of heirs to insist that *the money should be laid out in free- [*18] holds, in order to claim it for the escheat;(*t*) and it would likewise appear, by the language of Lord Loughborough in the same case, that it would be a great stretch even if that circumstance of the option (to lay out the money either in freeholds or leaseholds) were wanting, for a court of equity to convert it, in order to give it to the Crown; nor, where such option is given, will the trustee have any claim on failure of the right heir of the cestui que trust; and it would likewise seem, that, upon the doctrine of *Burgess* v. *Wheate*,(*u*) if there was no option, the trustee would have cousiderable difficulty in substantiating his claim to the property, as being in the possession of the legal estate, and no person being in existence who could call for the execution of the trusts.

But when by will, personalty is directed to be invested in the funds, or converted into land for the benefit of a charity at the option of the trustees, it must be observed, that as the fund cannot, on account of the statute of Mortmain, be laid out in land, no option to the trustees can

(*m*) Thornton v. Hawley, 10 Ves. 129.
(*n*) Kentish v. Newman, P. Wms. 234. Lechmere v. Carlisle, 3 P. Wms. 215. S. C. Forr. 80.
(*o*) Symons v. Rutter, 2 Vern. 226. Lechmere v. Carlisle, ut supra. Scudamore v. Scudamore, Pre. in Cha. 543.
(*p*) Young v. Combe, 4 Ves. 101.
(*q*) Stamper v. Millar, 3 Atk. 211.
(*r*) Swan v. Fonnereau, 3 Ves. 41.
(*s*) Bristow v. Warde, 2 Ves. jun. 336.
(*t*) Walker v. Denne, 2 Ves. jun. 170.
(*u*) 1 Eden, 177.

possibly arise, and they will, therefore, be compelled to invest the money in the funds ;(*v*) and, indeed, as we shall see hereafter, unless the power to invest in the funds be given, the disposition of the testator will be totally void.

There may be likewise a species of conversion which is not absolute, but relative, depending either upon the option of the owner(*w*) or upon certain contingencies, on the event of which it will take effect : [*19] *as money to be laid out in land in a certain district, and till land be procured, the property to be dealt with as money, and if in the intermediate time certain events happen, the money then to be paid over as such.(*x*)

So, likewise, in the conversion of real estate into personal, there may be such a conversion as may depend on a contingency not in the option of the owner, nor taking place even during his life, and the property then will not be taken as of the nature it was at the time of the contract or deed, but of such as it was intended to be, on the happening of the contingency. As where(*y*) *A.* made a lease to *B.* for seven years, and on the lease was indorsed an agreement, that if *B.* should choose within a limited time to purchase the inheritance of the premises for 3000*l.* *A.* would convey them to him for that sum. *B.* assigned to *C.* the lease and the benefit of this agreement. *A.* died, and by will gave all his real estate (generally) to *D.*, and all his personal estate to *E.* and *D.* equally. Within the limited time, but after the death of *A.*, *C.* claimed the benefit of the agreement from *D.*, who accordingly conveyed the premises to *C.* for 3000*l.*: although it was urged that the testator had declared no intention, but it was left to the choice of *D.*, and according to this construction, a simple contract-creditor might wait twenty years to know whether there were any assets or not; and likewise that *B.* and *D.* might come to an agreement, that *D.* should release to *B.* his power of election for 100*l.* or any other sum, and no one could prevent it ; yet the [*20] Master of the Rolls considered, that as it was clear *that if a man seised of real estate contract to sell it, and die before the contract is carried into execution, it is his personal property, the only possible difficulty in this case was the option, that it was left to the election of *D.* whether it should be real or personal, and which seemed to make no distinction at all ; for suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money, this when cut down would be part of the personal estate, although it depends upon the buyer whether he gives security or not ; and as to the circumstance of the capability of *D.* to release his power of election, he thought a court of equity would relieve against that, if it appears to be done collusively to oust the legatee of his personal estate ;(*z*) when the party who has the power of making the elec-

(*v*) Walker v. Denne, 2 Ves. jun. 170. Soresby v. Hollings, cited 3 Ves. 50, et vide Curtis v. Hutton, 14 Ves. 539.

(*w*) Amler v. Amler. 3 Ves. 583.

(*x*) Wheldale v. Partridge, ubi supra.

(*y*) Lawes v. Bennett, 1 Cox. Ca. Cha. 167.

(*z*) As in Bubb's case, where *A.* did contract with *B.* for a parcel of land for 5000*l.* and paid him 140*l.* in part, but before the rest of the money was paid, or any conveyance executed, *B.* dies and makes *C.* his executor, *D.* being his heir. *C.* prefers a bill against *A.* and *D.* to have the rest of the purchase-money ; who answered, that they did not intend to pro-

tion has elected, the whole is to be referred back to the original agreement, and the only difference was, that the real estate was converted into personal at a future period. And he therefore declared this 3000*l.* to be part of the personal estate of the testator.

*So, likewise, where three persons joining in trade, requiring a mixture of real and personal property for the management of the business, enter into a deed of partnership by which it is provided, that upon the decease of the shortest liver of the partners, the two survivors, if they should think proper, or such survivor as might think proper, might have and take the part or share of such shortest liver at the price therein agreed on, upon condition that such price should be paid to the trustees within six months after the death of the shortest liver. One of the surviving partners elected to purchase the share of the deceased partner. And the question was, what interest the deceased partner had in the freehold premises, whether the money arising therefrom should go to the heir or be treated as personal property, whether in fact three persons, having interests as tenants in common, and looking to certain events, (amongst the rest, the death of the shortest liver, and which had happened,) might not contract in this manner, in order to make the most of the property, though real in a strict sense, yet commercial in its nature, to sell it altogether; and upon this deed the Chancellor thought such intention appeared, and that this was a case of contract for sale looking to a certain event which had happened, and therefore the property must be considered as the personal and not the real estate of the deceased partner.(*a*) [*21]

But when money is to be laid out in land, or remain unconverted until any definite period, it is important that such an intention be as clearly and explicitly *made, as when an absolute and immediate conversion is intended. [*22]

As illustrative of the propriety of clearly indicating such an intention, we may state the facts of the case of *Wheldale* v. *Partridge*:(*b*) By a deed-poll reciting the marriage of *E. W.* and *S. W.* and that before the marriage *S. W.* was seized in fee of certain lands in the county of Lincoln, devised to her by her father, and that upon the request of *E. W.* she had consented to the sale thereof, and had executed proper conveyances for that purpose, and in consideration thereof *E. W.* had paid to a trustee 1200*l.*, part of the money raised by the sale, to be disposed of as after-mentioned, *E. W.* and his wife granted the 1200*l.* to the trustee, his executors, &c., upon the trusts after declared; and agreed that the trustee, his executors or administrators, *should lay out the money in the purchase of lands and tenements lying in the said county, of as good value as he or they could get for the same, as soon as conveniently might be; and should cause or procure such lands and tenements when purchased, to be settled and conveyed to such uses as E. W.*

ceed with the bargain, and *A.* said he was willing to lose his 140*l.* that he had paid. But the Court ruled, that the executor should have the money, and that *A.* might, when he pleased, compel the heir to execute a conveyance of the estate; and the reporter adds in a note, that the Court took this to be a fraud betwixt *A.* and the heir, supposing that the heir had agreed to pay back the money to *A.*, and so to have kept the land, which was worth much more; for now the heir was to convey the land, but to have nothing for it, for the executor was to have the money. Vide Freem. C. 38, and the note there.

(*a*) Ripley v. Waterworth, 7 Ves. 425.

(*b*) 5 Ves. 388. 8 Ves. 227.

and S. his wife should appoint, and for want of such appointment to the use of the right heirs of S. W. the wife for ever: and it was agreed that the trustee, his executors and administrators, should, *in the mean time, until such purchase and settlement could be made,* put out at interest the 1200*l.*, upon such security as *S. W.* should approve, in his and their names, and pay the interest thereof from time to time to *E. W.* and his assigns during his life; and after his decease *pay and apply the principal money and interest in manner therein mentioned;*
[*23] that *is to say, in case *S. W.* should happen to survive *E. W.*, then in trust, that the trustee, his executors or administrators, should after the death of *E. W.* pay all the said money, as well principal as interest, unto *S. W.* and her assigns, to be disposed of at her free will and pleasure; and in case *S. W.* should die before *E. W.* and leave any child or children, then that the trustee, his executors and administrators, after the death of *E. W.* should apply and dispose of all the said money, as well principal as interest, towards the maintenance and education of the children until they should attain the age of twenty-one years; and then the residue of such principal should be equally divided amongst them: but if such child and children should have attained that age at the time of the death of *E. W.* then the trustee, his executors and administrators, should pay the said principal money, and such interest as should then happen to be in arrear and unpaid, to such child and children, to be equally divided amongst them, if more than one, or their legal representatives: but in case *S. W.* should happen to die before *E. W.*, and leave no children, then the trustee, his executors and administrators, should after the death of *E. W.* pay the said principal money and all the interests thereof unto such person or persons as *S. W.* should by her last will and testament, in writing, or by any other writing to be signed by her in the presence of two or more credible witnesses, give and bequeath, and at such time and times as the said *S. W.* by such last will or writing should direct or appoint.

The money was afterwards invested on proper securities, and so continued till the death of *S. W.*, who died without issue; leaving her hus-
[*24] band surviving, who *died soon afterwards. No appointment was executed by will or otherwise.

The question was, whether *E. W.* and *S. W.* his wife had, under the circumstances, declared their intention that this property should be land, and settled with the ultimate remainder to the heirs of *S. W.*

In the first instance, the master of the Rolls considered this money as land; afterwards, on reconsideration, he was of opinion that the money must, in the event that had happened, be taken as money, and not land. The case was afterwards heard on appeal before the Lord Chancellor, when his Lordship gave the question the most elaborate consideration. "I avow," said he, "that my mind is subdued by the difficulties presented on the part of the heirs; and I have not confidence enough to say, the difficulties on the other side are not as considerable." His Lordship then proceeded to state the facts, as favourable as possible for the heir, observing that this money was raised out of the produce of the wife's estate, and that to that extent neither she nor her heirs ought to be in a worse situation; and having remarked that if the deed had concluded at the first declaration of the trust, according to the appointment of *W.* and his wife, and, for want of appointment, to her right heirs for ever,

it would immediately upon the execution have impressed this money with real qualities; and that the peculiarity of the words "lying in the said county" would not have taken it out of the rule in general cases, impressing it with real uses and qualities; and that if land had been proffered, a proper conveyance would have been made, either at the suggestion of the parties themselves, or of the Court. His Lordship observed, the question was, upon the whole, whether, notwithstanding *the general doctrine, there may not be a particular case in which enough appears upon the instrument to show the parties did not mean that the fund should be absolutely impressed with real qualities, and clothed with real uses, immediately upon the execution, but should remain personalty, in an event to which they looked, in case the purchase was not actually made; and, after stating that there were cases in which the parties meant that the instrument should not immediately upon the execution impress the property with real qualities, and clothe it with real uses, proceeds: upon the direction, "in the mean time," &c. "in an ordinary case, I should agree to the construction of the heir: if there was nothing more explaining the necessary meaning of the words, they would have no more effect upon the real uses, with which the property was before clothed, than the ordinary words in every settlement, expressing that the interest and dividends shall go as the rents and profits of the lands, if purchased, would have gone. But in this instance, the application in the mean time is not only of the interest, but also of the principal; if, therefore, those words are to be applied in the ordinary sense, it must be also said, that if, after the principal was paid over, a purchase could be found, the principal ought to be brought back; for the natural sense of the words, unless a contrary construction can be made upon the whole instrument, is, that the principal is to be applied, in the mean time, in the same manner as the interest: but as the intention could not be to bring back the principal, if absolutely paid over, in order to execute the purposes of the former part, these words, therefore, cannot be here used in their ordinary sense; for the principal might be paid as money, and *not be laid out in land. Upon the whole, therefore, these words must be applied to such payments, under a future direction, as are consistent with the idea of a future purchase to be made, and separated from such directions as require payment of the money as a principal fund. The words 'in the mean time,' &c., have not here their ordinary sense; for they must be taken to mean, that if a purchase was procured in a particular period, viz. the life of the husband and wife, it was to be land; but if they did not call for it to be laid out in land, and died before any purchase, then it was to be money; and if the husband survived every rational purpose, for the wife to secure it to her and her heirs is properly secured by this power of appointment, by which she might give it to them, if she chose." Therefore the Chancellor considered that the decree ought not to be reversed.

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Such, then, were the difficulties the Court found itself involved in, the verbal criticisms and the elaborate reasoning, merely because the intention of characterizing the property was not upon the face of the instrument sufficiently explicit.

In the course of this treatise a variety of other instances of the conversion of property will occasionally present themselves, but as it would be difficult to arrange them under any specific title, it is hoped that enough

has been said in the present chapter to give the reader a general view of the purport of our subject.

[*27] *CHAPTER III.

OF THE PERIOD FROM WHICH THE CONVERSION IS CONSIDERED TO COMMENCE.

HAVING thus shown the various means by which a conversion of property may be effected, it will, in the next place, be necessary to ascertain the *period* from which this conversion may be considered to commence.

Nor is this by any means a mere speculative inquiry, but one of the greatest importance and utility.

In the conversion of property by deed, the provisions either of the deed itself, or of a collateral deed of trust, generally define the period for the commencement of the interest to be enjoyed in the property so directed to be converted, and if the conversion relates to any distant period or contingency, we have pointed out in the last chapter that it cannot be considered as effected before the period arrives or the event happens.

But when property is directed by will to be converted, the time at which the enjoyment of the property when converted is to commence, is so frequently left undefined by the testator, and the conversion itself so often embarrassed by circumstances which never entered the testator's mind, that unless some equitable rule for the commencement of the interest of the person beneficially entitled be laid down, he would sometimes be in danger of losing all the advantage intended him by the will.

[*28] *In consideration of this part of our subject we shall keep distinct the conversion of personalty into realty, from that of realty into personalty, not only on account of the uniformity of the work, but because some of the rules as applicable to the one species of conversion will not be found equally so to the other.

1. And first as to personalty directed *by will* to be converted into realty; such conversion may be considered in a general point of view as taking effect from the death of the testator.

In the case of *Beauclerk* v. *Mead*,(a) Lord Hardwicke expressed his opinion to be, that though money directed to be invested in land must be considered as land, yet the will by which this conversion is effected must be complete, for the will was ambulatory till the testator's death, nor till then could the money be considered as land; indeed to suppose otherwise, would be to exempt the testator's personal estate from debts by simple contract.

So far, then, as the conversion of personalty into realty is either unembarrassed by conditions enjoined by the testator himself, or divested by circumstances necessary to be accomplished before a fund for the conversion can be constituted, there does not appear to be any doubt; but

(a) Atk. 167, et vide Mendham v. Munton, R. B. B. 1796.

in consequence of the clauses repugnant to the general purpose, with which testators often shackle their wills directing such a conversion, and likewise of the very general nature of personal property, of its liability to increase or decrease before the fund for conversion into realty can be constituted, of the possibility of its being out on mortgage, or invested in securities difficult to be obtained or remotely situated, and of various other incidental circumstances, there *are few difficulties in the present doctrine greater than those with which the courts of equity have contended, when endeavouring to lay down general principles to regulate the conflicting claims of those who are desirous that their beneficial interest in the fund should commence as early as possible, and of the opposite party who conceive themselves benefitted by a postponement of the enjoyment, until the fund can be accumulated into one mass preparatory to the purchase of land. [*29]

It frequently happens that a testator directs his personal property to be collected and turned into money, and laid out in land to be settled in strict settlement, and unlimited clauses of accumulation of the personalty until the purchases are likewise added: it is obvious that the claims of the tenant for life and remainder-man must immediately clash: the tenant for life is desirous that his interest should commence immediately, and will, at the expense of the fund, use all possible means to gather in the personalty; the remainder-man, on the contrary, is desirous, by a delay of the enjoyment of the first taker, to increase the accumulations; and therefore the courts of equity have been compelled to adopt some general principle to equalise as much as possible such opposing interests.

In the case of *Entwistle* v. *Markland*,(*b*) (24th July, 1795,) *Henry Entwistle*, by will, after directing his legacies and debts, &c., to be paid out of his personal estate, gave all his money and securities for money, and all his estates and interest in such securities by mortgage or otherwise, and all his personal estate whatsoever to *Markland* and others, upon trust, as soon as might be after his death, to call in and receive all the *money due to him, whether principal or interest, and to convert all his personal estate into money; and without delay, and with all convenient speed, to lay out and apply the whole of all such monies, *and the interest thereof to accrue and accumulate in the mean time*, in and for the purchase of freehold lands and tenements of inheritance, upon trust to convey the same to the use of *R. E.* for life, without impeachment of waste; remainder to trustees to preserve, &c.; remainder to his first and other sons in tail male; remainder to *B. E.* for life; with remainders over, and appointed the trustees executors. And by a codicil, the testator gave full power to the trustees either to continue or to call in and lay out again, until proper purchases could be found, all or any part of his money at interest on such security, real or personal, or funds, as they should think proper. The testator died without altering his will; and subsequently, on the death of *R. E.*, the first tenant for life without issue, *B. E.* brought his bill, praying (*inter alia*) that he might be declared entitled to the interest of the residue of the testator *Henry Entwistle's* personal estate, from the death of *R. E.* [*30]

Upon the Master's report it appeared, that the first tenant for life had

(*b*) Reported in a note in 6 Ves. 528.

possessed a considerable part of the personal estate; and agreed to sell real estates of his own to the executors, to the uses of the will; and that there had been an opportunity of laying out part of the personal estate, which had not been so laid out; and that several parts of the personal estate were out upon mortgages, on which it had become impossible, for want of heirs and persons abroad, to get in the money. The cause coming on for further directions, it was declared, that the personal estate of the testator, *Henry Entwistle*, *not having been applied, as [*31] the same was got in and received, in the purchase of real estates, pursuant to the directions of the will, the plaintiff, *B. E.*, *was entitled to receive the interest of such personal estate, or of such part thereof, which had been got in and received, and not so applied from the death of R. E.*; and it was ordered, that the several sums of interest, which appeared by the Master's report to have been paid in, being the interest reported to have accrued from the death of *R. E.*, *together with the future interest of the outstanding personal estate* of the testator, until the same should be got in and laid out in the purchase of lands, be paid to the plaintiff, *B. E.*, when and as the same should be got in and received.

It has been observed(*c*) that in this case the register could not have correctly taken the declaration of the principle of the Court as to the interest of the tenant for life; for it was inconsistent with the declaration of the Court, since it was quite clear from the proceedings and the report that the person who got the rents and profits, though tenant for life in remainder, got the produce of property, which no diligence of the executors would have enabled them to collect and get in, as it appeared, that several parts of the personal estate were out upon mortgage securities, such in their nature that though at first probably very convenient securities, they had become otherwise, and it was quite impossible that they could be got in; the terms of the will, therefore, connected with the evidence, adverted to personal estate directed to be got in with all convenient speed, which, so far from being left outstanding through the negligence or dilatoriness of the executors, could not *by any possibili- [*32] ty have been got in; and, therefore, as to that part of the personal estate, the principle in the decree must have been mistaken. The principle of the first part of the declaration was obviously right; for if the personal estate was got in, and not applied, it was dilatoriness, which should not prejudice any one. It was inaccurate in first supposing all the personal estate actually got in, and in the latter part, supposing that only part had been got in. But upon the report it appeared, not only that great part had not been got in, but that with no diligence it could have been got in. The claim, therefore, of *R. E.*, the first taker for life, was left out. But the decree afterwards proceeded to order, that *B. E.* should have the interest of that part of the personal estate which had not been got in. Lord Loughborough's opinion must have been, that the embarrassments created by the state of the property made impracticable the general purpose, that the first tenant for life should have the enjoyment of the interest of the property; but yet the effect might have been, that, by giving the tenant for life in remainder the interest, not

(*c*) 6 Ves. 537.

only of that part of the testator's personalty which had been got in, but also of that which had not been got in, the purpose of the testator might possibly have been defeated entirely.

The circumstances, however, of this case were peculiarly complicated and embarrassing; and although relief was given to the tenant for life, yet no general principle appears to have been obtained for the solution of difficulties of this nature: the desirable object of equity seems to have been, to give the tenant for life that benefit intended him by the testator, without at the same time injuring the remainder-man, by wasting the property in peremptorily calling in the testator's personal estate, or violating his intentions altogether with *regard to the accumulation of the interest, until the entire fund for investment [*33] in realty to be settled to the uses under the will had been collected; for it was very possible that by this accumulation of interest, the tenant for life might be deprived of his benefit under the will altogether; or, by enforcing the executors to take all the remedies competent to them for calling in the personalty, might injure the fund, and lessen the benefit intended for the remainder-man.

At length a case(*d*) occurred, when it became absolutely necessary for the Court to arrive at some general doctrine to solve the difficulty, some general rule to regulate claims of this nature arising between the tenant for life and remainder-man. The facts were shortly these: Francis Sitwell, after bequeathing certain annuities and legacies, some bearing interest and others not, proceeds, in his will, to give all his personal estate to his executors, for the purpose of paying his legacies, annuities, &c., and subject and without prejudice to the payment of any legacies, annuities, &c., directs his executors or the survivor of them, with all convenient speed to lay out and dispose of the rest and residue of his personal estate in the purchase of manors, lands, tenements, or hereditaments of inheritance in fee-simple in possession, to be settled as therein after-mentioned; and orders *that the interest of such residue of his personal estate should accumulate and be laid out in lands, to be settled in like manner as he had directed the residuum of his personal estate.* The will then directed that the estates so to be purchased should be limited to the testator's eldest son, *S. S.*, for life, with remainders to his first and other sons in tail male, &c.

*The testator died leaving a very considerable personal property, part of which being outstanding on mortgage could [*34] not be got in. A bill was filed by *S. S.* praying the necessary accounts; and that he might be declared to be entitled to the interest of the clear residue of the personal estate, not specifically bequeathed, so far as such residue had not been laid out in the purchase of lands under the will, from the end of one year after the testator's death, or from such other period as the Court should be of opinion he was entitled thereto; that such interest might be paid to him, and that such parts of the residue as had not been laid out in the purchase of lands, might be so laid out according to the will, subject to the payment of certain legacies, &c.; and that he might be let into possession of the estates, when purchased, subject to the annuities, &c. The decree directed the usual accounts, and payment of legacies, &c., and an inquiry, what steps had been taken to

(*d*) Sitwell v. Bernard, 6 Ves. 520.

get in the personal estate outstanding upon securities: that the Master should state the clear residue, and how it had been disposed of, and distinguish what part consisted of principal, and what part had arisen from interest, from the end of twelve months after the testator's death. It appeared by the Master's report, that some part of the personal estate was still out on mortgage, that the heir of the mortgagee being a minor, no proceedings could be effectually pursued, that the executors were induced to delay filing a bill by a proposal to pay the mortgage by a sale, which took place accordingly; but that many of the purchasers not being able to complete their purchases, the executors had been compelled to receive the money by instalments, conceiving that more for the benefit of the testator's estate than to file bills; but from the difficulty *of raising money, and other circumstances, a considerable sum still remained due. The report likewise stated that the executors had laid out part of the personal estate in the purchase of real estates; one of which was purchased from the plaintiff. The question, as far as respects the present inquiry, arose upon the plaintiff's claim to the interest of the personal estate, after the payment of legacies, &c., which had not been laid out in land, from the end of a year after the testator's death: and the Lord Chancellor, after having stated the necessity of establishing some general rule, equalising as much as possible the interest of the tenant for life, and remainder-man, &c., and reviewing very elaborately the cases bearing upon the point, which, although they had generally adopted the principle of convenience, yet had established no fixed principle, stated his opinion that the question was, whether (keeping in view the general clause of accumulation) upon the whole will considered upon the principle of the Court, and the decisions, the testator could mean, that, if the property could not be cleared in the whole life of the tenant for life, yet the interest of the tenant for life was to be wholly disappointed. His Lordship then proceeded in his judgment to say, upon the whole, if the Court could adopt a general rule of convenience, it must be, that it will act upon the enjoyment of the tenant for life, at that period, when upon its own rule it supposes that the purposes can be answered, although the fund is not cleared; and as it is impossible to say the tenant for life could have the interest of the residue before the time when the fund could be constituted, for which purpose, as there are many charges on the testator's personalty, the Court generally allows a year; therefore the plaintiff must *wait one year. But the further question will be, whether he is to wait longer; and if so, whether he must not of necessity wait till the personal estate can be actually collected: part may be collected from time to time in his life, and he might enjoy the rents and profits of the estates purchased with those parts; but it might happen that no part might be got in during his life, as if the debts on mortgage were only part of the personal estate, it would then be impossible to say when either of those funds could be realized. The Court is therefore either driven to take the end of the year, upon the principle of general convenience, or to examine in each particular case what convenient speed and reasonable diligence would have done, what negligence, or the law of the country, or other circumstances have prevented; and to make those inquiries at the hazard of obtaining no clear result. The Lord Chancellor therefore considered, that justice required that the plaintiff should have the interest

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from the end of the year, and the more so, because he was clear that by distributing that justice to him, the essential interests of the persons in remainder were in reality consulted, as then, from the death of the tenant for life, they would have the benefit of that justice whether the fund was converted into land or not; and if that was not done, the rule might press as hard upon them as upon the first tenant for life.

The reader will not fail to observe the absolute necessity of imposing some restriction on such an unlimited clause for accumulation; for if the interest were to accumulate during the length of time which might possibly be requisite to call in the personalty, the tenant for life might be disappointed altogether of the benefit intended him; nor would such restriction be at *all detrimental to the interests of the remainder-man, since, by compelling the executors, at every risk, [*37] to call in the personalty as early as possible, the property might be greatly wasted to the injury of the remainder-man, and the intentions of the testator very probably defeated.

But it appears that the grounds of this judgment have been somewhat misunderstood; for, in the case of *Taylor* v. *Hibbert*,(e) where a testator, after devising lands to uses in strict settlement, gave a residue of his personalty to be invested in lands to be settled to the same uses, it was decided by the Master of the Rolls, that the tenant for life was not entitled to the interest of the residue till one year from the testator's death.

His Honour, the late Master of the Rolls, in his decision, alluding to the case of *Sitwell* v. *Bernard*, is reported to have said, that it appeared to be the intention of the Judge who decided that case, to lay down generally, that by analogy to the rule by which legatees are held entitled in all cases, at the end of one year from the testator's death, one year ought therefore to be considered, in the absence of particular circumstances, as a reasonable period to collect the testator's estate, and to invest it in a purchase; and that whatever particular circumstances there might be, rendering the difficulty greater or less, it was better to fix one year as the time, in which (allowing for the difficulties that usually occur) it would be fair to suppose that the residue might be ascertained, that being the period at which, as the Lord Chancellor observed, "in the contemplation of this Court, the residue would be formed *as residue."(f) No such principle, however, as that alluded to in [*38] his Honour's decision appears to have actuated his Lordship's mind; for in the case of *Sitwell* v. *Bernard*,(g) there was an indefinite direction to accumulate, and the reasoning there went only to fix a time at which such accumulation of interest should cease, a period when the tenant for life should begin to reap a benefit under the testator's will; indeed, had the case of *Sitwell* v. *Bernard* been a precedent for that of *Hibbert* v. *Taylor*, it must have been inferred, that because an accumulation of interest was prevented in one case, it must *therefore* be given in another: such would inevitably be the conclusion; but these cases, so far from being parallel, must be considered as the converse of each other.

Again, in the case of *Griffith* v. *Morrison*,(h) where *J. S.* devised his real estates in strict settlement with the ultimate remainder to his

(e) 1 Jac. & Walk. 308.
(f) 6 Ves. 543.
(g) Ubi supra.
(h) 1 Jac. & Walk. 311, n.

own right heirs, and gave his personal estate to trustees, upon trust, to pay debts, legacies, &c., and subject thereto, to invest the same in the funds, *and the interest to be placed out again half yearly as an accumulating fund, until his personal estate could be laid out in real estate*, to be settled to the same uses as that of which he died seised, the heir at law of the testator (all the remainders having fallen in) was held entitled to so much of the testator's personal estate as had not then been laid out in the purchase of real estate, and to the accumulations on the whole of such residue, from the death of the testator up to the end of one year after his death: here, *although the question did not arise between the tenant for life and the remainder-man, the insertion of the clause for accumulation brought it within the reasoning of *Sitwell* v. *Bernard*.

[*39]

It appears indeed that some time had elapsed before the Lord Chancellor had an opportunity of adverting to the erroneous notion which had been entertained respecting the grounds of his decision in *Sitwell* v. *Bernard;* at length that opportunity occurred in a cause which lately came before him,(*i*) it was one of very considerable importance, involving property to a great amount.

A testator devised his lands to *A.* for life, remainder to his children in strict settlement, and gave several annuities, and pecuniary and specific legacies, and also all his stocks, funds, money, securities for money, and all the residue of his personal estate, upon trust, to sell, and with all convenient speed to lay out and invest the same in the purchase of lands, and forthwith to convey, settle, and assure the lands so to be purchased, to the uses thereinbefore declared of and concerning his estates; with a proviso that in the mean time and until the said trust monies should be laid out and invested in a purchase or purchases in the manner thereinbefore-mentioned, it should be lawful for the trustees to place out and invest the same in their names in the public stocks, funds, &c., *and that the dividends, interest, and annual proceeds arising from such stocks, funds, &c., should from time to time go and be paid to such person or persons, and be applied to such uses, intents, and purposes, and in such manner as the rents and profits of the hereditaments to be purchased with the monies invested *thereon would go, and be payable in case such purchase or purchases were actually made.* The testator died possessed of a very large personal property; and after providing for the payment of his debts and funeral expenses, and of the legacies and annuities given by his will, the interest of the clear residue of his personal estate in the hands of his executors amounted to many thousand pounds per annum.

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The bill was filed by the first tenant for life, *A.*, within a year after the death of the testator, against his children, the tenants for life in remainder, and against the executors for the purpose of having the question determined, whether he was entitled to the annual interest of the clear residue of the testator's personal estate from the time of his death; or whether the amount of such interest during the first year after the testator's death, formed part of the general residue of the testator's personal estate for the benefit of the plaintiff during his life, and of the devisees in remainder after the decease of the plaintiff. The Lord Chancellor, in his judgment, proceeded to say, I take the cases of *Sitwell* v. *Bernard*,

(*i*) Angerstein v. Martin, 1 Turner, 232.

Entwistle v. *Markland*,(*k*) and *Stuart* v. *Bruere*,(*l*) not only not to govern this case, but to be directly the converse of it. In all those cases an accumulation was directed, and the intention was, that the intermediate rents and profits until the purchase was made, should form part of the monies to be laid out; no person was to take any interest until the trusts with respect to the purchase were completed, and those trusts could not be completed until the intermediate profits were laid out. In *Sitwell* v. *Bernard*, the question was, what the Court *was to do, where [*41] the testator directed the interest to accumulate and be laid out with the principal; and it was held, that the direction for accumulation should only operate for one year, and that although the personalty remained as personalty, it should at the end of the year be considered as converted; that the beneficial enjoyment should be the same as if the conversion had been made: and that decision appears to have been right, nor was it inconsistent with the preceding cases, although the same rule had not been laid down. The principle on which the Court proceeded in that case was this, that such a conversion must be made as was most for the benefit of all parties, and that by compelling the trustees to proceed with all diligence to get in the personal estate, to arrest mortgages, file bills of foreclosure, and sue upon bonds, the accumulation would in all probability be much less than if more temperate proceedings were taken. The Court therefore in that case, contemplating all the difficulties which belonged to such a trust, cut the knot, and said, that after the end of a year the accumulation should cease, and what was real should be enjoyed as real, and what was personal should be enjoyed as personal. Those cases essentially differ from this, in which the testator directs that when the personal estate shall be collected, not that the interest thereafter to arise shall be laid out with the principal, but shall be enjoyed by the person entitled to the rents and profits: the question then is, whether (as the testator has given the tenant for life an immediate interest in the real estates, and has directed that if in the course of the year an estate shall be bought, the tenant for life shall be entitled to the rents from the time of the purchase, although the year has not elapsed, and has also directed *as to the personal estate, that it shall be laid out on mortgage, [*42] or in the stocks; a direction which would not compel the trustees if they found money on good security to call it in,) there can be any inconvenience in saying, that the tenant for life is entitled to the interest of personal estate from the death of the testator. This case is clearly distinguishable from those which direct an accumulation, and, therefore, with respect to the interest of so much of the personalty bearing interest, as is not necessary to be applied for the payment of debts or legacies, the tenant for life is entitled to it *from the death of the testator*.

Nor is there any ground to say, if the fund for conversion be constituted out of *residuary* personal estate, that *consequently* the enjoyment of the tenant for life does not commence for a year from the testator's death; for although in the case of *Stott* v. *Hollingworth*,(*m*) the Vice Chancellor said, that it was a legal presumption, that until the end of a year the residue cannot be ascertained, and that what is ascertained at the end of the year to be residue shall be capital, to the interest of which the tenant

(*k*) 6 Ves. 528.
(*l*) C ted 6 Ves. 529, and mentioned in a subsequent part of this chapter.
(*m*) 3 Madd. 161.

for life of the residue shall be entitled; yet in the subsequent case of *Hewitt* v. *Morris*,(*n*) where a testator after giving several pecuniary and specific legacies, gave and bequeathed the residue of his estate and effects, upon trust, to turn into money, and invest the same in the funds, or upon securities, the interest to be paid to *A.* for life, and after his death, the principal to be held upon trust for his children; the Lord Chancellor, having stated the question to be, whether the tenant for life was to
[*43] have the interest which proceeded *from the fund, so far as it was not necessary to be disturbed for the payment of debts and legacies, from the death of the testator; or whether the interest for the first year was to be added to the bulk of the residue, held, that the tenant for life might be entitled to this interest from the testator's death; and it is presumed, that whether this fund, constituted of residuary personal estate, remain always as personalty, or its ultimate disposition be a conversion into realty, the claims of the tenant for life to the interest of it will be founded upon the same principle.

It appears then, that in a question between the tenant for life and remainder-man, when by the testator's residuary personal estate, a fund is constituted to be invested in land to be settled to uses in strict settlement, with a general clause of accumulation as to the interest of the personalty, until called in and invested; such clause will be restricted in its operation to a year from the testator's death, from which period the tenant for life will be entitled to the interest of the fund until converted into realty, when he will receive the rents and profits.

That if there be no such clause of accumulation inserted, there is no reason why the residuary estate, if clear, and there is no inconvenience in doing it, may not be handed over by the executors, and the interest of the tenant for life commence immediately.

It may not be improper here to add, that the residuary personal property may be of so fluctuating a nature, that a considerable increase of it may occur in the period between the testator's death, and the earliest and most convenient time of conversion, a question then may arise, whether the tenant for life is entitled to any benefit from this increase; whether,
[*44] in fact, his interest *is to take its date from the death of the testator or from the time of the conversion.

In the case of *Gibson* v. *Bott*,(*o*) a testator gave all the rest, residue, and remainder of his goods, &c., to his executors upon trust, that they should, as soon as conveniently might be after his decease, sell all such parts thereof as should not consist of money, and should place out the sums arising from such sale at interest, and stand possessed of the money so invested upon trust, as to one moiety, to pay the interest to *J. D.* for life, and after her decease to dispose of the stock amongst her children equally; and a similar trust was declared as to the other moiety. Between the testator's death and the sale a considerable increase had taken place in the testator's property, chiefly consisting of farming stock, and he question was, to what interest in the increased produce, during the period above-mentioned, the tenants for life were entitled? And the Lord Chancellor, after observing that when a testator gives interest of a fund, to be created by a sale as soon as conveniently could be, he meant

(*n*) 1 Turn. 241. (*o*) 7 Ves. 89.

only the interest from the time the property could be conveniently sold, decreed that the persons entitled for life should have the interest from the time of the sale, as it had taken place in a reasonable time.

It is submitted, that, upon the same principle, if the testator had directed the fund constituted by the produce of the sale of his effects to be laid out in real estate, and settled to uses, in a question between the tenant for life and the executor, the tenant for life would likewise be entitled to the interest of the produce arising from *the increase* in the period between the testator's *death and the sale of the testator's personal estate. [*45]

So likewise, the personal property of a testator, directed to be turned into money, in order to be laid out in land, may consist of an interest wearing out as a lease for years, or an interest at present saleable, but in point of enjoyment, future, as a bond to receive a certain sum of money, but which does not bear interest, or a lease to commence at a future day; and in questions of this nature, between the tenant for life and the remainder-man, a valuation is fixed, and the tenant for life is entitled to the interest of the capital produced, or supposed to be produced from such valuation; so likewise where, in the case of a trade, the profits were to continue to a certain period after the testator's death, and then the balance being liquidated to be divided at various periods between the partners, the tenant for life of the fund constituted of such personalty was, during the period between the death of the testator and the termination of the partnership, entitled to the interest at a given rate, and not the profits; and after the termination of the partnership, to the interest of the testator's share of the balance, to be paid at the various periods, that interest being calculated with reference to the circumstance of the balance being paid in at different stated periods. (*p*)

If, then, the capital to be constituted by means of such interests as are wearing out, and not capable of present enjoyment, be by will ultimately directed to be laid out in land to be settled in strict settlement, it would seem that the like rules are applicable as to *the interest of the tenant for life, until by the purchase of land he is able to enjoy the rents and profits. [*46]

It is submitted, that, in the conversion by will of personalty into realty, the following conclusions are established by the preceding cases:

1st. That generally this conversion takes effect from the death of the testator.

2dly. That if the fund for this conversion into realty to be settled in strict settlement, be constituted by residuary personal estate, with a clause for accumulation of interest until the whole can be collected in a mass for such conversion, in a question between the tenant for life and remainder-man, the operation of this clause will be restricted to one year from the death of the testator, when the tenant for life will begin to be entitled to the interest in lieu of the rents and profits, until the purchase is made.

3dly. That if there be no such clause of accumulation, although this fund be constituted of residuary personal estate, if it be clear and there is no inconvenience, there does not exist any reason why the tenant for life should not commence immediately to enjoy the interest.

(*p*) Fearns v. Young, 9 Ves. 549.

4thly. That upon the doctrine in *Gibson* v. *Bott*, if there be any increase of the testator's personal estate in the period between his death and the constitution of the fund for conversion, the tenant for life will be entitled to the benefit of the interest of that part of the fund formed by this increase.

5thly. If the testator's personal estate to be converted into realty to be settled in strict settlement should consist of the partnership of any trade, the dissolution of which is to take place, and the profits to be divided at stated periods after his death, in a question between the tenant for life and remainder-man upon the doctrine *of *Fearns* v. *Young*, the tenant for life will be entitled to interest at a given rate, and not the profits until the termination of the partnership, and then to an interest on the capital due to the testator out of the concern, the capital being valued with reference to the periods at which the instalments of it are payable; and if the personal estate should consist of any interest wearing out or whose enjoyment is future, that a valuation should be made at the death of the testator, and the tenant for life be entitled to the interest arising from the supposed value of such interests, until the produce be laid out in land, when he will be entitled to the rents and profits.

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Lastly, we may add, that if the money to be settled be invested in stock until a convenient purchase in land be found, as a court of equity cannot apportion the dividends, if the tenant for life die in the middle of a quarter, the interest of the remainder-man will commence from the receipt of the last dividends, for by act of Parliament the dividends on stock are made payable on certain days, therefore these dividends are like rent, and distinguishable from interest of money; and it will be the same though the interest and dividends were directed to go as the rents and profits would in case it was laid out in land; and although it was supposed that under the statute of 11 Geo. 2. c. 19, the dividends ought to be apportioned between the personal representatives of the tenant for life and the remainder-man, yet that act only applies to demises and leases determinable on the death of the tenant for life;(*q*) but if the money be laid out in mortgage securities, the tenant for life will be entitled to an apportionment, for the *interest on a mortgage becomes due *de die in diem*, and a mortgagee may at any time call in his money and receive interest up to the day, because no particular time is fixed.(*r*)

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II. As to the period from which a conversion by will of realty into personalty may likewise be supposed to commence.

It is evident that on account of the real estate to be converted not being of so general and indefinite a nature as personal property, there will not be in this consideration the same difficulties as in the preceding section.

(*q*) Wilson v. Harman, 2 Ves. sen. 672. Rashleigh v. Masters, 3 Bro. C. C. 99. Sherard v. Sherard, 3 Atk. 502.

(*r*) Edwards v. Countess of Warwick, 2 P. Wms. 176.

When land is once impressed by will with the character of personalty, the person entitled to the interest of the fund arising from the produce will likewise be entitled until sale to the rents and profits, which will not therefore go to the heir ;(*s*) and as a court of equity considers that to have been done which ought to have been done, a direction to sell a real estate with all convenient speed after the death of a testator, is *primâ facie* a direction for an immediate sale.(*t*)

In the case of *Casamajor* v. *Strode*,(*u*) *W. S.* devised real estate to trustees upon trust, "as soon as conveniently may be after my death" to sell and dispose of the same, by public or private sale, and to stand possessed of the proceeds on certain trusts for several persons respectively for life, and after their respective deceases for their children. The decree declared that the devisees for *life named in the will were entitled to the rents and profits of the real estates thereby devised from the death of the testator. [*49]

But where there was a direction to sell an estate with all convenient speed after the death of a tenant for life (who was in under the will,) *and certain legacies were bequeathed out of the produce, bearing interest from the death of the tenant for life,* and the residue of the money to be invested in the purchase of public stocks or funds, or government or real securities, upon trust, to pay the interest to *A.* and his assigns for his life, and after his decease then over ; the case was considered still stronger, and the life interest of *A.* was held to commence immediately on the death of the tenant for life, notwithstanding that the estate was not sold by the trustees, and the person entitled to the interest for life was held to be entitled, (on keeping down the interest of the legacies,) to the perception of the rents and profits until a sale could be made ; here, indeed, the circumstances were evidence that such was the actual intention ; for as the testatrix did not contemplate that intermediate rents would arise, she directed interest on the legacies from the death of the tenant for life to be paid, not out of the rents, but out of the trust-monies ; and it was a reasonable inference, that, as those, who were intended to take interests for life in part of the produce of the sale, took *expressly from the death* of the tenant for life, the testatrix must therefore have intended that *A.*, who took for life the interest of the residue of the produce of the sale, should take equally from the death of the tenant for life.(*x*)

It must, however, be remarked, that in this case, if it *could have been considered that the testatrix died intestate as to the interim rents and profits before sale, *A.* would have equally taken them as heir at law ; yet the grounds of the decision do not appear to be placed upon that circumstance, but upon the principle, that, as the enjoyment of the legacies raiseable out of the produce of the real estate on the death of the tenant for life, was to commence immediately on that event, so likewise was the enjoyment of the interest of the residue of the produce. [*50]

Where real estate is devised to be converted, or sold for the purposes

(*s*) Yates v. Compton, 2 P. Wms. 308.
(*t*) Fitzgerald v. Jervoise, 5 Madd. 25.
(*u*) Reg. lib. A. 1809, Aug. 17, fol. 1275, cited in note 19 Ves. 390.
(*x*) Fitzgerald v. Jervoise, 5 Madd. 25.

of distributing the money, Lord Thurlow, in the case of *Hutchin* v. *Mannington*,(*y*) says, "it is clear it will neither depend upon the caprice of the trustee to sell, for that would be contrary to all common sense, nor upon his dilatoriness; in some way it may be sold immediately: but it is not necessary to inquire when a real estate might have been sold with all possible diligence, for it might be the very next day, or that very evening; and therefore the Court always in such a case considers it as sold the moment the testator is dead: for where there is a trust, that which is ordered to be done is in equity always considered as actually performed."

The truth of this general proposition relying on so fundamental a maxim of equity, is unquestionable, and the soundness of it has been admitted by Lord Eldon,(*z*) and Sir William Grant.(*a*)

Nor will any unlimited power given to the trustees for sale affect the general application of this rule; for in the case of *Walker* v. *Shore*,(*b*) where there was an absolute and arbitrary discretion given to the trustees to convert, it was held that the tenant for life of the interest of the pro-
[*51] duce was not, on that account, to be *debarred during the pleasure of the trustees from a perception of the benefit intended him by the testator's will, as some definite period ought to be fixed by courts of equity, at which a sale, if not made, ought at least to be considered as made. The facts were these: A testator left all his copyhold estate to his executors upon trust that they should *at such time and in such manner as they should think proper*, make sale thereof, and place the money arising from such sale upon such securities as they should think proper, and pay and apply the dividends and produce thereof to the sole and separate use of *J. W.* for her life, independent of her husband, or his debts and engagements; and after her decease then over. The testator died, the copyhold estate was not sold immediately on his death, as the tenant for life, and those in remainder had entered into an arrangement to postpone the sale to a more advantageous opportunity, in consequence of which it was brought before the Court, and the Master of the Rolls expressed himself, that, although the direction to the trustees in this case was not, as it usually was, to sell as soon as conveniently might be, but at such time, and in such manner as they should think fit, yet this circumstance did not make the right of the tenant for life entirely dependent upon the time at which the sale should actually take place; as it was impossible to say, that the trustees might arbitrarily postpone the sale to an indefinite period, placing the tenant for life and those in remainder in a totally different relative situation from that in which they would have been had the sale been made with reasonable diligence; and therefore it was doubtful whether the Court could usefully attempt in each case to ascertain the precise period at which, in the exercise of a
[*52] sound discretion, the sale ought to *have been made: even under words of such apparently large discretion, it would be necessary to decide upon the respective rights of the tenant for life, and the remainder-man, by some fixed rule, and to hold the conversion to have been made at some given period, just as much as if the trustees had been directed to sell with all convenient speed: in this case as the estate

(*y*) 1 Ves. jun. 366.
(*a*) Elwin v. Elwin, 8 Ves. 556.
(*z*) Sitwell v. Bernard, 6 Ves. 536.
(*b*) 19 Ves. 387.

was very much underlet (the rental being only 32*l.*) it was considered advisable that the sale should be postponed until the leases should be nearer expiring: at the time when part of the estate was sold, it brought upwards of 24,000*l.* and the remainder was valued at 15,000*l.*, and if the whole had been sold at the death of the testator it would not have realized more than 9000*l.*; when the tenant for life was apprised of the real value of the property, she brought a bill praying to have the interest of the money the estate would have fetched at the testator's death, and likewise interest upon that interest as a compensation for her loss until the sale; but the Master of the Rolls considered her as bound by the arrangement, that she was only entitled to the rental up to the time of the partial sale, from which he gave her the interest of the produce of that which was sold, and of the value of that which remained unsold.

But although the real estate is generally considered as sold from the death of the testator, yet he has the power of making, by an express form of words, or clear indication of intention, the vesting of a benefit arising from the produce of real estate, to depend upon any contingency he may thing proper, provided it be not in other respects unlawful. In a case(*c*) cited by the Master of the Rolls, an estate was *devised to be sold, for the purposes of distribution of the money [*53] arising from the sale, into four equal shares; and there was a proviso, as to two of the legatees, *that if either of them should die before the estate should be sold, and the purchase-money received by the testator's trustees*, the share of the deceased legatee should go over. A decree was made directing a sale, and an agreement was entered into for sale, and the purchaser having paid off a small mortgage on the estate, was let into possession, paying four per cent. interest on his purchase-money. Before the agreement was carried into execution, or the sale completed, one of the legatees died: sometime afterwards the other legatee died; but it appeared that on the day the purchaser was let into possession, the surviving legatee had signed a receipt for a considerable sum as part of her share: the money had not been actually paid, but she took it so. A bill was filed by the legatees over of the respective shares; but it was insisted, on the part of the executor of the last surviving legatee, that the estate ought to be considered as completely sold, and the purchase-money as paid in her life. And the Court decreed, as to the share of the last surviving legatee, that it had become a vested interest, and the interest of the other legatee was decreed to be paid to the legatees over under the proviso in the will.

So, also, in a subsequeut case,(*d*) when *C. E.*, devising certain estates to his wife for life, upon condition of her releasing her right of dower on the other estates, with a direction, that as soon after her death, or refusal to release dower, the estates so devised to her for life should be sold, and the monies arising therefrom, and the rents and profits until sold, divided between his *five nephews, share and share alike, at such time as the sale should be completed, in case they should be then [*54] living; but in case any of them should depart this life, either in his lifetime, or before the sale should be completed, the interest of the nephews was given over to their respective issue. The widow, in compliance

(*c*) Faulkner v. Hollingsworth, cited 8 Ves. 558.
(*d*) Elwin v. Elwin, 8 Ves. 547.

with the will, released her dower; and before the sale of the estates, but after the death of the widow, one of the nephews died, leaving children; and the question was, whether the nephew, having survived the widow, took a vested interest in the produce of these estates; or whether, as he died before the sale, his children should have the share originally intended for him? And the Master of the Rolls decided, that the nephew dying before the sale did not take a vested interest in the produce.

If, therefore, the testator has expressed any intention as to the time when the conversion of real estate into personal, for the purposes of distribution, is to be considered to take effect, such an intention, however difficult of execution, will control the generality of the rule above laid down by Lord Thurlow in the case of *Hutchin* v. *Mannington* before alluded to.

But if a will directs a conversion of realty into personalty, for the purpose of giving the interest or dividends of the produce to *A.* for life, and after his death to transfer the capital to another, with a general clause of accumulation of the rents and profits until the sale of the real estate take place, it appears that the probable construction of the Court would be to confine the operation of the accumulation clause to the period of one year from the testator's death.

In the case of *Stuart* v. *Bruere*,(e) where the trust on which lands were directed to be sold, was declared to *be, that they (the trustees) should, as soon as conveniently might be after the testatrix's decease, sell the same, and out of the money arising thereby, and the rents and profits accruing before such sale, pay and discharge certain incumbrances, and place out the remainder of all such profits of the said premises until such sale on government securities, and pay the interest and dividends of such government securities unto the plaintiff for life, and after his decease to his son or sons, if more than one, equally for life; and after the decease of the son or sons to transfer the securities as therein mentioned. After the death of the testatrix, the plaintiff, who was her heir at law, by his bill insisted that he was entitled to receive the rents and profits of the real estates, and the dividends of the money in the funds from a reasonable time after her decease, and that they ought not to be considered as principal to be laid out upon the trusts of the will until all the estates were sold. By the decree the sales were ordered to be made, and the money to be laid out according to the will; and the title of the plaintiff to the interest of the fund was declared to be constituted by the decree. The sales having been delayed, the plaintiff presented a petition to the Chancellor, insisting that, under the circumstances, the general intention being, that he should have the beneficial interest of the fund for his life, he ought not to be delayed in the perception of that benefit by the non-execution of the trusts; and that the rents and profits of the real estate ought not to go to the capital, nor the sales to be delayed, when that intention was clear: but Lord Loughborough held, that the petitioner was entitled to receive the rents and profits, making the necessary abatements for debts, &c., from the period of the first decree, and *not from the period of one year after the death of the testa-

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(e) Reported in note 6 Ves. 529.

trix. Lord Eldon, however, adverting to the principle upon which this period was fixed, said,(*f*) that although it happened that the difference in time was not much, yet the difference in principle was very material; for Lord Loughborough, by his order, made upon the petition and a report of the state of the funds, notwithstanding the language of the decree was that the rents and profits until the sale, and the interest and dividends of the stock until converted into money, should go to form one fund, the interest of which the plaintiff was to take, considered the sales *as made*, in the view of the Court, *by the decree* which ordered them to be made, and, taking care to reserve a sufficient fund for debts and legacies, gave him the rents and profits and the interest of the fund unconverted from that period; which, in point of fact, was supposing that there was a principle in the justice of the Court requiring him to consider that as done, when it was ordered to be done; that is, from the date of the decree when procured; differing from Lord Thurlow, who considered it as ordered to be done *from the death of the testator*. But it is not the right rule to say, that when a decree is obtained, directing a trustee to do some act, *the time is that of the decree;* for the language of the decree is no more than the language of the will: the Court orders it to be done only because the testator ordered it to be done; and can never intend *that the decree*, because the money was not laid out in convenient time, *is to give date to the enjoyment of the property*, as if it had been laid out in convenient time; since, if the trustees have not done what they ought, the Court orders it without prejudice to the interest of the persons entitled, as if it had been done.

*In this case there were words pointing to an accumulation, [*57] although, indeed, altogether so ambiguous as to leave it extremely doubtful whether the intention was to postpone the enjoyment of the tenant for life, or to increase for the benefit of the remainder-man, that fund, of which, at some time or other, the tenant for life was to have the enjoyment. It appears that Lord Eldon's opinion was that Lord Loughborough gave the report that he could have provided for the interest of the debts and legacies at the time of the decree.

Hence it is clear that no general principle, meeting with the approbation of the present times, could be deduced from this case, to regulate the decisions in similar instances: but, whether it be personalty directed to be converted into realty, or realty into personalty, with a general clause of accumulation, in the one instance, of the rents and profits, in the other of the dividends, until the conversion had been duly effected; as well the interests of the tenant for life and remainder-man are alike consulted, and the intention of the testator promoted, by confining the operation of the accumulation clause to the period of one year from the death of the testator.

It is therefore submitted, that in the conversion by will of realty into personalty:—

1stly, That, generally, this conversion must be considered to take effect from the death of the testator.

2ndly, That a conversion to be effected "with all convenient speed," will likewise be considered as effected from the testator's death; nor

(*f*) 6 Ves. 520.

will words of absolute power to the trustees to convert at their discre-
[*58] tion, enable *them to delay a sale of the testator's real estate to an unreasonable period.

3rdly, That the enjoyment of the interest under this conversion may be deferred by the intention of the testator when clearly expressed; when the postponement is not for an indefinite period.

4thly, That a general accumulation clause of the rents and profits until sale, will, in a question between the tenant for life and remainderman, most probably be restricted to one year from the testator's death.

5thly, That unless such accumulation clause be added, there will be no reason why the tenant for life of the interest of the fund to arise from such conversion should not enjoy the rents and profits until sale.

[*59]

*CHAPTER IV.

OF THE CONSEQUENCES OF A CONVERSION OF PERSONALTY INTO REALTY. —EFFECT OF THE STATUTE OF MORTMAIN ON MONEY DIRECTED TO BE LAID OUT IN LAND.—SUBSTITUTION OF LAND FOR MONEY COVENANTED TO BE INVESTED, &c.

From the period at which the conversion of property may be considered to have been effected, we are naturally led to the consideration of its consequences.

We have said that equity considers real estate, or personal, as that species of property into which it is directed to be converted; and as it is the course of succession and the law of descent which are the true characteristics of, and constitute the proper difference between, real estate and personal, so we shall endeavour to ascertain, by these incontestable proofs, the transubstantiation which, in the eye of equity, the property has undergone. It will, then, be apparent from an inspection of the cases, that money will as strictly adhere to the principles of real estate in all its various devolutions and complex limitations, as land will to the laws by which personal estate is regulated.

In the present chapter we shall exclusively consider the effects of a conversion of personalty into realty; as, when once money is impressed with the character of realty, it will be chargeable, transmissible, and descendible as such, until that impression has been duly removed; the means of doing which will be discussed in the concluding chapter.

[*60] *It has been long ago decided that money to be laid out in land is not subject to the payment of debts by simple contract, but considered as actually converted;(*a*) and in the case of *Trelawney* v. *Booth*, (*b*) this equity was carried to a great extent: *A.* had advanced to *B.* the sum of 500*l.* upon a promissory note, upon an

(*a*) Lawrence v. Beverley, 2 Keb. 841. Pembroke v. Baden, 2 Ch. Rep. 115. 2 Vern. 52.
(*b*) 2 Atk. 307.

assurance by *B.* that he was entitled, under a decree of the Court of Chancery, to the sum of 4000*l.*, which had lately been bequeathed to him ; *B.* died soon afterwards, and his representative refused to pay the 500*l.* ; in consequence of which *A.* brought his bill against him for the money : but it appeared in the cause that the 4000*l.* was not merely as a pecuniary legacy, but directed to be laid out in land, and settled upon *B.* in fee, and as the decree was in pursuance of the will, the Chancellor dismissed the bill, remarking, that although this was a case of hardship, he could not break through so established a rule of Court as to let in the simple contract creditor on money devised to be laid out in land.

But although simple contract creditors have no claim on personalty when under the impression of realty, yet it is, as land, subject to bond-debts ;(*c*) and simple contract creditors will be allowed to have the assets marshalled ; for, notwithstanding the doubtful manner in which Lord Harcourt delivered his opinion in a case(*d*) where a sum of money was put into the hands of trustees upon marriage, to be laid out in lands to be settled in strict settlement, the wife having died leaving issue a son, and the husband also dying before the money was laid *out, devised all his estate, both real and personal, to trustees [*61] during the minority of his son for his benefit ; and in case he died before the age of twenty-one, gave several legacies and the residue of his personal estate to charitable uses ; the son died before twenty-one ; the creditors brought a bill against the husband's executor and brother who claimed the trust-fund as real estate, and not subject to debts by simple contract ; it might at first be thought that he considered the fund as subject to simple contract creditors, yet it appears from the Register's book, that Lord Parker, in 1720, (when the cause came on to be heard, and the Master's report had been received) held, that the resort of the simple contract creditors was confined to so much of the trust-fund only as had been previously exhausted by the specialty creditors out of the personal estate.

Where a sum of money was to be laid out in lands to be settled in strict settlement, charged with the sum of 2000*l.* for the portions of younger children, and there was inserted a proviso that until a proper purchase could be found the trustees might invest the sum to be laid out in any public or parliamentary funds ; the trustees, after the marriage, invested the trust-fund in South Sea lottery annuities, and by the great losses the fund was reduced to nearly one-half of the original sum ; it was decreed that the residue should be laid out in the purchase of lands to be settled, and that the younger children should abate their claims on the 2000*l.* proportionably to the loss incurred during the investment of the fund in the South Sea lottery annuities.(*e*)

Money thus impressed with the character of land is, in analogy to real estate, subject to tenancy by the *courtesy,(*f*) as, where *A.* [*62] devised 300*l.* to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children ; if she died without issue, then over. She was married to *B.*, by whom she

(*c*) Cattell v. Money, 3 Bro. C. C. 255.
(*d*) Fulham v. Jones, 7 Vin. Abr. 44.
(*e*) Chambers v. Chambers, Fitz. 127, S. C. Mos. 333.
(*f*) Sweetapple v. Bindon, 2 Vern. 536.

had a child; and on the death of the mother and child, *B.* brought his bill to have the money laid out in lands, and settled on himself for life, as being tenant by the courtesy; or in lieu of the profits of the land, to have the interest of the money during his life: and the Chancellor decreed the money to be considered as lands, and the plaintiff to have the interest and proceeds thereof for his life, as tenant by the courtesy. This decision has always been approved of in cases requiring the application of a similar principle;(*g*) still, however, it is necessary that there be an equitable seisin in the husband of the trust-fund; for if it is set apart for the sole and separate use of the wife, then, as the husband could neither come at the profits nor possession, there cannot be any seisin in the husband either at law or in equity, and he could not therefore be entitled to be tenant by the courtesy.(*h*)

It has, however, been decided, that although the husband is entitled, where there is an equitable seisin only, to be tenant by the courtesy of a fund impressed with real uses, yet the wife is not likewise entitled to her dower.(*i*)

So, likewise, in compliance with the rules of real estate, there may be [*63] a species of possessio fratris of this *realizing trust-fund; for where, by articles of marriage, 500*l.* was agreed to be laid out in the purchase of freehold lands of inheritance, to the use of the husband for life; remainder to trustees during his life to preserve, &c.; remainder to the wife for life; then to all and every other child or children of the marriage, for such estate, &c., as the husband and wife, &c., should appoint, and in default of a joint appointment to be equally divided amongst the children, if more than one, as tenants in common, with cross-remainders, and benefit of survivorship; if but one, then to that child in tail; and in default of such issue, to the husband, his heirs, and assigns for ever. They had issue one daughter, who married the defendant: there was no appointment; the trustee paid the 500*l.* to the defendant and his wife, who received it as money, for which a release was given, reciting the articles. The bill was brought by a daughter by a second marriage, against the defendant, the representative of his wife, the daughter by the first marriage, for this 500*l.*, praying that it might be considered as land, and that, as the reversion in fee vested in the father, her half-sister continuing tenant in tail during her life was never seized in possession of that reversion: And upon the question, whether this reversion so vested in the father could descend to the sister of the half blood, the Lord Chancellor held that it might; for where not clothed with possession, it follows the rule of possessio fratris, although it was not exactly the same case.(*k*)

As legacies charged upon this realizing trust-fund are of the same nature as when charged upon real estate, the rules of construction are the [*64] same, and they *will, in the event of the legatee dying in the testator's lifetime, sink into the fund in favour of the heir at law; as in the case of the *Attorney General* v. *Milner*;(*l*) where *A. S.*, by her will, amongst other legacies, gives to three trustees 8000*l.*

(*g*) Otway v. Hudson, 2 Vern. 583. Fletcher v. Ashburner, 1 Bro. C. C. 498. Cunningham v. Moody, 1 Ves. sen. 174. Dodson v. Hay, 3 Bro. C. C. 407.
(*h*) Hearle v. Greenbank, 2 Vern. 695.
(*i*) Crabtree v. Bramble, 3 Atk. 687. D'Arcy v. Blake, 2 Sch. & Lef. 389.
(*k*) Cunningham v. Moody, 1 Ves. sen. 174. (*l*) 3 Atk. 111.

upon trust that they should dispose thereof in the purchase of lands of inheritance in fee-simple, to be settled to the use of her grandson *T. M.*, and the heirs of his body; and for default of such issue, directed the trustees to convey the same to the Drapers' Company, upon trust that they should, within three months after the estate should be conveyed to them, *by mortgage or sale of some part thereof, raise and pay to E. L., her nephew, 2000l., which she bequeathed to him in case of the death of her grandson without issue;* and that they should dispose of so much of the rents of such estate, after payment of the 2000*l.* as therein was mentioned. *E. L.* died; then *T. M.* died also without issue: And the question was, whether this legacy of 2000*l.* was lapsed, as *E. L.* died before the contingency happened; or whether it was transmissible to his representative? And the Master of the Rolls considering the 8000*l.* to be laid out in land as land, was clearly of opinion that it was a legacy charged on real estate, on a contingency which had never happened, and that it must, therefore, sink into the residue for the benefit of the heir; for if it is a rule that a legacy out of land, given as a portion to a child who dies before the contingency happens, shall go to the heir, and not to the representative of the child, à fortiori shall the legacy payable out of land observe the same rule when given to a stranger.

*And so, in its transmissible qualities, money thus impressed with the character of land, equally resembles real estate; for an infant cannot dispose of it by will, but must consider it as land;(*m*) nor can a feme covert pass her interest in such an estate without examination in a court of equity; for as no fine or deed of appointment by her can be effectual, this money being entirely a creature of equity, it can only be bound by a decree of the Court;(*n*) nor can a recovery be suffered of it; but any conditions which are imposed on the fund may be barred by articles of agreement between the parties interested.(*o*) [*65]

Nor is it necessary that a will, in order to pass the realizing fund, should particularize the locality of real estate, as it will pass by a general devise of real estate. The case of *Lingen* v. *Sowray*(*p*) appears to be one of the earliest cases in which this point was indirectly decided: there, by marriage articles the husband agreed to add 700*l.* to the wife's portion of 700*l.*; and the securities for these monies were assigned to trustees, and agreed to be invested in land to be settled in strict settlement. The marriage took effect, and there was no issue. The husband by will devised some lands to the wife, the rest of his real estate in the county and city of York *and elsewhere* in Great Britain he devised to *J. S.*, and gave his personal estate and all his securities for money to his wife, whom he made executrix, and died leaving many of the securities unaltered, but some of the money had been put *out upon other securities; in trust for the husband, his *executors and administrators*, the question was, whether these securities passed as personal estate to the wife? and the Lord Keeper decided, that the arti- [*66]

(*m*) Carr v. Ellison, 3 Bro. C. C. 56. Duchess of Buckinghamshire v. Sheffield, 3 Bro. P.C. 148. Bowes v. Shaftesbury, 5 Bro. P. C. 144.

(*n*) Benson v. Benson, 1 P. Wms. 130. Walker v. Denne, 2 Ves. jun. 170.

(*o*) Pullen v. Ready, 3 Atk. 587. (*p*) 1 P. Wms. 172.

cles had, in equity, changed the nature of this money, and turned it as it were into land: and, therefore, as to so much of the 1400*l.* as was subsisting upon the securities on which it was originally placed, or on any other securities where no new trusts had been declared, it ought to be considered as real estate; but as to so much as was called in by the testator, and afterwards placed out in securities of a different nature, it should be taken as personal estate.

So likewise in the case of *Guidot* v. *Guidot*,(*q*) the generality of the words was held to include a fund of this nature in the devise of real estate; and in answer to the objection, that the lands do not lie anywhere, for they were not as yet purchased, it was said, money was in equity like bona notabilia in the Ecclesiastical Court, which must be either in the diocess of the Bishop, where the person dies, or in the diocess of the Metropolitan, if he was possessed of money in different places; so that it was either in money or on mortgage, and therefore the word *elsewhere* certainly included it.(*r*)

So also where *A.*, previous to his marriage, agrees to lay out the sum of 5000*l.* in land to be settled on *A.* for life, remainder on wife for life, remainder to *A.* in fee. The marriage took effect, and there was no issue. *A.* died without having made any disposal of his reversionary interest in the 5000*l.*; the sum having been laid out on mortgage, descended to his heir at law, who, by his will, gave certain specific lands, [*67] &c., *and all other *his messuages, lands, tenements, and hereditaments whatsoever and wheresoever situate, and not therein by him given or devised:* To hold, &c.; and he gave all his lands which he had in mortgage to his wife, whom he appointed amongst others executrix of his will. And on the question, whether this 5000*l.* to be laid out in land should pass as land, or go to the legatees of the personalty? the Lord Chancellor considered that there was no difficulty, but that this must be considered as land; he also added, that if the testator possessed estates in different places from those described, it might have afforded an argument that it was descriptive of locality; but here he has added the words lands, tenements, and hereditaments whatsoever and wheresoever.(*s*)

In the case of *Hickman* v. *Bacon*,(*t*) where money upon marriage was agreed to be laid out and settled upon the trusts therein mentioned, viz. to the use of *A.* for life; remainder to preserve, &c.; remainder to the intent that *A.*'s wife might receive a rent-charge; remainder to the use of the trustees for raising portions for younger children of the marriage; remainder to the use of the first and other sons in tail male; remainder to *A.* in fee. The money was invested in South Sea annuities until a proper purchase could be found. *A.* died without issue male, having duly executed his will, by which he gave all his manors, messuages, lands, tenements, and *hereditaments in England* in possession, in reversion, remainder, expectancy, or otherwise howsoever, with their appurtenances, to his eldest daughter the plaintiff, for life, remainders over. The plaintiff brought her bill to have the South Sea annuities

(*q*) 3 Atk. 254.
(*r*) Et vide Potter v. Potter, 1 Ves. sen. 437.
(*s*) Rashleigh v. Masters, 3 Bro. C. C. 99.
(*t*) 4 Bro. C. C. 333.

considered as land, and so to pass under the general devise in the will; and she was *held entitled to a life-estate in the fund directed [*68] by the settlement to be laid out in land. But it must be remembered, that the will should be executed by three witnesses, or otherwise it might be considered partly as evidence to pass the fund as money and not land, as we shall see hereafter.

But although this realizing trust-fund will pass by will under the word "hereditaments," yet it would appear, that in the execution of a power by deed, disposing of money so characterized, a word of such general import will not be allowed to pass it: for in the case of *Brent* v. *Tyndall*,(u) 28th June, 1782, before Lord Thurlow, where a testator had devised his real estate in strict settlement, with power of jointuring all or any part, and had directed his personal estate to be applied in the purchase of lands, to be settled to the same uses, and a tenant for life had in pursuance of the power limited to his wife by specific descriptions all the devised estates, and had added, "and also all other the messuages, hereditaments, and premises of him, the said H. B. C. Brent, whereof or wherein he was then any ways interested in or entitled to, by virtue of the said recited will of the said H. Brent, the testator, or otherwise howsoever." The Lord Chancellor was of opinion that this did not extend to the interest which the appointee had in the personal estate of the testator, directed to be applied in the purchase of lands; and such personal estate was ordered to be paid to the heir of the remainder-man in fee under the will.

As to what will be necessary to pass a realizing trust-fund as money, or in fact to reconvert it, for when the character of land has once been impressed upon the *fund, it will not, unless there appear an [*69] intent to the contrary, pass as such under a general bequest to a legatee,(w) this will become a consideration to be discussed hereafter.

If the money be by will directed to be laid out in land, and no uses declared, the money will go to the heir at law of the testator;(x) or if there be no limitation as to the ultimate remainder,(y) or it be void for uncertainty in its disposition,(z) it will equally belong to the testator's heir, who will, however, be entitled to the land, when procured, by purchase and not by descent.(a)

Money when characterized as real estate, being a trust executory, is consequently susceptible of any impression which a court of equity would give it, so as best to satisfy the intent;(b) as, where(c) money was directed by will to be laid out in lands, to be conveyed to the use of one for life, remainder to the use of his first and other sons successively in tail male; Lord Hardwicke supplied a trust for preserving contingent remainders: he said, it was the bequest of a sum of money to be laid out in land, and therefore merely executory; and the question was, whether the Court should carry it into execution so as to make it nugatory, and of no effect; or so as to answer the clear intent of the testator, which was to have it put into strict settlement?

(u) 3 Bro. C. C. 99, n. 4.
(w) Lechmere v. Carlisle, ubi supra.
(x) Hayford v. Benlowes, Amb. 581.
(y) Fletcher v. Chapman, 3 Bro. P. C. 1.
(z) Leslie v. Duke of Devonshire, 2 Bro. C. C. 188.
(a) Robinson v. Knight, 2 Eden, 155.
(b) Sperling v. Toll, 1 Ves. sen. 69.
(c) Baskerville v. Baskerville, 2 Atk. 280.

And where(*d*) *B.* by his will gave 2000*l.* to be laid out by his executors in a purchase of lands, to be settled to *the use of the plaintiff's wife for life; remainder to trustees to preserve, &c.; remainder to the heirs of her body; remainder to *C. D.* for life; remainder to the heirs of her body; remainder over. The plaintiff brought his bill to be paid this money, or to have it laid out in a purchase of lands according to the trusts of the will. And Sir J. Jekyll, before whom the cause was heard, ordered the money to be laid out in the purchase of lands to be settled on the plaintiff's wife for life; remainder to trustees to preserve, &c.; remainder to the first and every other son of the plaintiff's wife in tail; remainder to the daughters as tenants in common in tail; with cross-remainders, &c.: declaring that if the lands had been devised by those words, the plaintiff might have been entitled to an estate-tail; but where money was to be laid out, the Court would pursue such a construction.

[*70]

So likewise where(*e*) there was a bequest of personal estate to trustees, in trust to lay out the same in land to be settled, and assured, as counsel should advise, unto and upon the trustees and their heirs upon trust, and to and for the use of *P.*, and the heirs male of his body, to take in succession and priority of birth; and for default of such issue male, then upon further trust, &c. Upon the question, whether the lands to be purchased should be settled on *P.* as tenant in tail; or in strict settlement upon him for life, with remainder to his first and other sons in tail male? Lord Northington, on hearing, directed the settlement to be made on him for life, with remainder to his first and other sons in tail male, and Lord Camden subsequently confirmed the decree. In cases of this kind the rule in Shelly's case *does not apply, for they are trusts executory; something is left to be done by the trustees or the Court; and therefore, in order to model the conveyance according to the testator's intention, the word "heirs" will be considered as a word of purchase and not of limitation: and there is no doubt, as well from the general tenour of the language of the Court in *Dodson* v. *Hay*,(*f*) as from the power of the Court over an executory trust, that the cy pres doctrine would be applied, though it does not appear that there are any instances in the books of such a construction.

[*71]

If the direction to lay out money in land be by will, the money will not fall under the jurisdiction of the Ecclesiastical Court;(*g*) and the legacy duty will likewise be payable upon it, notwithstanding it has been said that such will not be the case.(*h*)

Although every devise of lands must be considered as a specific devise, and money directed by will to be laid out in land is generally considered as converted from the death of the testator,(*i*) yet the fund out of which the land is to be purchased will not be considered as specific, but the legatee must proportionally abate;(*k*) for as it is not possible that the legatee can say, I have a right to this very money in specie, it is no specific legacy; but where the money directed by will to be laid out in land, and settled on the wife is in lieu of dower, a court of equity will,

(*d*) Ashby v. Buckle, A. 1. 464. Harg. MSS. 73.
(*e*) White v. Carter, Amb. 670.
(*f*) 3 Bro. C. C. 404.
(*g*) Pullen v. Ready, 2 Atk. 587.
(*h*) Attorney General v. Holford, 1 Price, 426.
(*i*) Beauclerk v. Mead, 2 Atk. 170.
(*k*) Pinkey v. Hinton, 1 P. Wms. 539,

from the consideration, look on the money as a specific legacy, and *the widow will not be required to abate in proportion with the other legatees.(*l*) [*72]

When a sum of money is given by the will of a testator to be laid out in the purchase of lands in a particular county, the constant ordinary course is to direct a purchase, and the produce of the money to go as the land itself until purchased ;(*m*) if, however, it be in a particular parish, there are the conflicting opinions of Lords Thurlow and Loughborough —the former supposing the money could not be laid out elsewhere, and the latter that it might be so laid out, if no lands could be procured in the specific situation.(*n*) In cases of this kind, where a bequest of money is made, and a direction only is given as to the mode in which the money is to be laid out, the doctrine is materially different from those cases where a contract, which would otherwise pass by a will, fails in its execution ; for in the former case the particular estate pointed out is only the mode directed for executing the primary intention for a purchase : the testator directs what he believes capable of being done in all events, though not in the precise mode ; and the Court follows that up, holding, that as it is directed to be done, so it shall be considered as done : but in the case of a contract for a particular estate, it is impossible to maintain, that if the devisee cannot take that estate, he shall therefore take the money and buy any other estate, as upon the ground of intention nothing could in general be more distant from the testator's meaning.(*o*)

*So likewise this realizing trust-fund also participates with real estate in its descendible qualities ; as, where(*p*) there was a devise of a sum of money to be laid out in a purchase of lands, to be settled on *A.* for life ; remainder to *B.* and his heirs ; but if *B.* die in the lifetime of *A.*, then to *C.* and his heirs. *B.* and *C.* both dying in the lifetime of *A.*, the money not having been laid out on the death of *A.*, was decreed to go to the heir, and not to the executor of *C.* [*73]

And where, by articles previous to marriage, it was agreed, the wife having 1500*l.* portion, that the husband should add 500*l.* more to it, and that the whole should be deposited in trustees' hands until a convenient purchase could be found out for investing it in land to be settled to the use of the husband and wife for their lives ; remainder to their first and other sons successively in tail ; remainder to their daughters in tail ; remainder over to the right heirs of the husband. The husband having died before any purchase, leaving the wife enseint of a child, who died soon afterwards, the wife took out administration to both ; and although, on the first hearing, it was decreed as money to go to the administratrix, yet this decree was reversed by Lord Chancellor Jefferys, who considered that the money was bound by the articles, and should be for the benefit of the heir, as the land would have gone in case the money had been laid out according to the articles.(*q*)

And in a case,(*r*) where a sum of money had been deposited in the

(*l*) Burridge v. Bradyl, 1 P. Wms. 137. Blowes v. Morret, 1 Ves. sen. 419.
(*m*) Per Lord Hardwicke, in Coventry v. Coventry, 2 Atk. 360.
(*n*) Maynwaring v. Maynwaring, 3 Atk. 413.
(*o*) Broome v. Monck, 10 Ves. 597.
(*p*) Scudamore v. Scudamore, Pre. Cha. 543.
(*q*) Kettleby v. Atwood, 1 Vern. 298 and 471.
(*r*) Symons v. Rutter, 2 Vern. 226.

hands of the trustees of a marriage settlement, until it could be invested in a purchase in lands, with the consent of the husband and wife, to be-
[*74] settled on the husband and wife for their lives; remainder to *their issue in tail; remainder to the issue of the wife; remainder to the wife in fee, the husband and wife having died without issue, and without a purchase being made, the right heir of the wife claimed the money as land; it was considered as money by Trevor and Rawlinson, but it was held by Hutchins, that this money must be considered as land, and that it could not upon the circumstances be considered as personal estate, but must be looked upon as land; and the opinion of Hutchins was afterwards considered by Lord Thurlow to have been the best founded.(*s*)

In these, and many similar cases,(*t*) the money was in the hands of the trustees; the same conclusion, however, will be arrived at, if the money is not placed out, but remains only in covenant; as, where(*u*) a sum of money was covenanted by marriage articles to be laid out in land, and settled on the husband and wife and their issue, remainder to the heir of the wife; the wife dying in the lifetime of the husband, the money was considered as bound by the articles, and decreed for the heir against the administrator of the wife.

So, likewise, where the money is partly in the hands of the trustees, and partly in the hands of the covenantor, it will equally descend as real estate to the heir.(*v*)

The doctrine that this realizing trust-fund is descendible as real estate, has been even carried so far, that, where the fund was(*w*) raised between the husband and wife equally on their intended marriage, and it was
[*75] *agreed that it should be laid out in lands, to be settled on the husband for life; remainder to the wife for life; remainder to the issue of the marriage, but was silent as to any ulterior limitation: there being no issue of the marriage, it was held, that the fund should descend to the heir of the husband: here, indeed, no money had been deposited in the hands of trustees, nor was the heir within the consideration of the settlement, nor was there any express limitation to the heirs of the husband. Now, although this case has been considered as rightly decided,(*x*) yet there does not appear any good ground why the Court should have added a limitation to the right heirs of the husband, so as to carry the fund over to his heir; indeed, there is a very just quære made by an eminent reporter in this case,(*y*) whether, if the money was to be taken as land, it had not been reasonable to let 1500*l.*, the wife's half, or the land therewith to be purchased, go to the heir of the wife, and the other 1500*l.*, or the land therewith to be purchased, go to the heir of the husband? And, perhaps, it would be difficult to answer this question in the negative consistently with the principles of equity. But there is likewise a case reported by Vernon, in which the ultimate limitation being wanting, the Court decreed it as money belonging to the

(*s*) Vid. Pulteney v. Darlington, 1 Bro. C.C. 222.
(*t*) Disher v. Disher. 1 P. Wms. 204. Lingen v. Sowray, 1 P. Wms. 172.
(*u*) Laincy v. Fairchild, 2 Vern. 101.
(*v*) Lechmere v. Carlisle, 3 P. Wms. 211.
(*w*) Knight v. Atkins, 2 Cha. Rep. 400. 2 Vern. 20.
(*x*) Lechmere v. Carlisle, 3 P. Wms. 218.
(*y*) Vide 1 P. Wms. 175.

wife: and which it does appear to be difficult to reconcile to that of *Knight* v. *Atkins*. George Cuthbert, having issue William, Edward, Jane, and Mary, by his will, in 1681, devised to his two daughters 550*l.* each, and ordered the same to be laid out in the purchase of lands by his executors within one year after his decease, to the use of his two daughters, and the heirs of their two bodies; and in *case either of [*76] them should die before marriage, that the sum of 150*l.*, part of the portion of her so dying, or if the 1100*l.*, should be laid out in land, that so much land, as should be of the value of 150*l.*, should go to the surviving sister; and the other 400*l.*, being the residue of the legacy of her so dying, or land to that value, if such purchase should be then made, should go to his two sons, equally to be divided between them and their heirs; and made Jane, his widow, and Henry Lee his executors. The two sons died without issue. Jane died unmarried. Mary survived, and married Thomas Abbot, the plaintiff, and died without issue. The plaintiff took out administration to his wife, and exhibited a bill against the executors of William Cuthbert, the heir-at-law, to have the 550*l.* and 150*l.* paid to him as administrator of his wife. The heir insisted, that the money, being by the direction of the will to be invested in land within a year after the testator's death, ought now to be looked on as land; and if a purchase had been made according to the direction of the will, it would have descended to him, he being the heir at law to the testator and his four children. But the Court decreed the 550*l.* and the 150*l.* to Abbot, as administrator of his wife.(*z*) Now, here, the time had arrived when the testator directed the fund to be taken absolutely as land; the ultimate limitation to the heirs of the testator was omitted; and although in the case of *Knight* v. *Atkins*, the direction was by settlement, and, here, by will, yet that circumstance does not appear to afford grounds sufficient for the distinction, that, in the first instance, the money should go to the heir as land, and in the latter, should go to the administrator as money, especially as the will appeared to contemplate a provision for marriage.

*The case of *Chichester* v. *Bickerstaff*(*a*) (where *J. C.* having married the daughter of *C. B.*, it was by marriage articles agreed, that *C. B.* should pay 1500*l.*, which, together with 1500*l.* more to be advanced by *J. C.* within three years after the marriage, should be invested in lands to be settled in strict settlement, and *J. C.* and his wife having both died before the expiration of the three years, and *C. B.* being appointed the executor of *J. C.*, who devised the residue of his personal estate *after payment of his debts*, to his sister, the money was considered as money, and not descendible as land,) has not unfrequently been supposed(*b*) to be in opposition to the doctrine here attempted to be shown, that money when once impressed with the character of realty will continue to retain that impression until some act has been done to remove it; but we shall endeavour to show in a subsequent page(*c*) of this treatise, that this case was very far from oppugning the class of authorities here adduced, as the money was decreed to go to the executor, on account of the supposed disposition of it by the will of the person who [*77]

(*z*) Abbot v. Lee & Cuthbert, 2 Vern. 283.
(*a*) 2 Vern. 295. (*b*) 3 P. Wms. 221, Forr. 90
(*c*) Vide chapter viii.

was the absolute owner of the fund, and which was under the particular circumstances of the case considered to amount to a declaration of withdrawing from the fund its quality of real estate.

But although, as we have seen, this trust-fund will pass to the heir at law of the settlor, though not within the consideration of the settlement, yet this doctrine has not been established without some opposition; for it has been said,(*d*) that as there is no consideration to give the heir that which by law would belong to the personal representative, equity will leave them to their legal rights, and will not allow them to take the property *as in a state of conversion, but as it is in realty; and that in this respect settlements(*e*) could not be compared to devises, for under the latter the devisees of the fund to be converted had a consideration, viz. the devise, which trust equity would perform; but in settlements, the heir not coming within the reasons of the settlement, had no consideration, and, consequently, there was no equity between the real and personal representatives to claim property in a shape different from what it was in realty. This objection, however, is now completely overruled; but as the grounds on which the objection was founded do not enter into this part of our treatise, we shall defer any further discussion of the validity of it to a future opportunity.(*f*)

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The customs of particular places which regard personalty do not at all affect a fund when under the impression of real estate; for where a freeman of London, upon his marriage, covenanted to add 1500*l.* out of his own personal estate to 1500*l.*, which was the portion of his then intended wife, and both these sums were to be laid out in a purchase of land, to be settled upon the husband for life, and then to the wife for her life, for her jointure and in bar of dower, with remainder to the children of the marriage; it was held, that money covenanted to be laid out in land, was, to all respects land in equity, and would descend as land for the benefit of the heir, and not go to the executor, that it might be entailed, and had the other qualities of land, and, consequently, was not within the custom of London;(*g*) and even after the marriage money might *be so laid out and settled, and would be considered as land, and not as personalty within the custom.(*h*)

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It might be proper here to remark, that the statute of mortmain,(*i*) as it is commonly, but improperly called, for it does not prevent the alienation of land in mortmain, cannot be defeated by a conversion of property, by which an interest in land is brought into charitable purposes, or by which money can be laid out in any such interest, unless under the restrictions of the act; for the words of the statute, which go far beyond the title, are very express. It is called an act to restrain the disposition of lands whereby the same become unalienable; and by the first clause it is enacted, "that no manors, lands, tenements, rents, advowsons, or other hereditaments corporeal or incorporeal whatsoever; nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever to be laid out or disposed

(*d*) Per Lord Rosslyn in Walker v. Denne, 2 Ves. jun. 176.
(*e*) As to what estate the consideration of marriage and the marriage portion will support, vide Osgood v. Strode, 2 P. Wms. 245, and the cases there mentioned.
(*f*) Vide chap. vii. (*g*) Babington v. Greenwood, 1 P. Wms. 530.
(*h*) Annand v. Honeywood, 1 Vern. 345.
(*i*) 9 Geo. 2. c. 36.

of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever:" And by the third clause it is enacted, "that all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, *tenements, or hereditaments; or of any stock, [*80] money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or any charge or incumbrance affecting to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the 24th day of June, 1736, be made in any other manner or form than by this act is directed and appointed, shall be absolutely and to all intents and purposes null and void;" therefore, between the first and third clauses of the act not only is the conversion of money into land by will for charitable purposes restrained, but likewise the conversion of real estate into personal; and when no option is given to the trustees, but the direction to purchase land is mandatory, a bequest of money to enable the trustee of a charity to complete a contract for the purchase of land, or to enable the trustee to pay off a mortgage sum (part of the purchase-money) secured upon an estate conveyed to religious purposes, are equally void, as coming under the statute.(*k*)

The only instance in which an interest in land (if such it can be called) appears to have escaped the severity of the act, seems to be that of allowing a charity to have the money arising from the sale of estates, which had only been *contracted for* in the testator's lifetime, and were in his possession at the time of his death.(*l*)

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*Substitution of land for money to be invested, &c. [*81]

Connected with this part of our subject, may be considered that implied performance of covenants to invest money in land, which springs from the supposition, that when a person lies under an obligation to do anything, it is more natural to ascribe it to the obligation he lies under than to a voluntary act independent of the obligation.(*m*)

And although money and land, being things in their nature entirely different, cannot exactly be said to be taken in satisfaction for each other, yet there are circumstances under which land will be presumed to be

(*k*) Kirkbank v. Hudson, Dan. 259. Corbyn v. French, 4 Ves. 418.
(*l*) Middleton v. Spicer, 1 Bro. C. C. 201.
(*m*) Lechmere v. Earl of Carlisle, 3 P. Wms. 211, Forr. 80.

taken as a substitution for that which was covenanted to be purchased and settled to certain uses.

In the case of *Wilcocks* v. *Wilcocks*,(*n*) *A.* covenanted on his marriage to *purchase* lands of 200*l.* per annum, *and settle them* on the wife and issue of the marriage in strict settlement. He afterwards purchased lands of that value, and died intestate, having made no settlement, but permitted them to descend to his eldest son; and it was held, that the lands descended being of 200*l.* per annum, and upwards, ought to be deemed a satisfaction of the covenant. But the Court will direct the land to be conveyed to the uses of the settlement, for they do not arise by force of the covenant; since, at the time of entering into the covenant, there was no seisin in the lands to serve the uses.

[*82] So, where a man covenants to *convey and settle* *lands, and *afterwards* purchases lands, but dies without making any settlement, the after-purchased lands were held in satisfaction of the covenant; the case was held to be still stronger than a mere covenant to settle lands.(*o*)

And where, in a covenant to settle lands, and the heir was not bound, nor the lands specified, the lands descended to him were taken to be in performance of the covenant.(*p*)

And if the lands descended are *in fee*, they may be taken in satisfaction of a covenant to settle lands *in tail*, if they are of equal value.(*q*)

In the case of *Lechmere* v. *Carlisle*,(*r*) it was taken as a principle in equity, that, where a man covenants to do an act, and he does that which may *pro tanto* be considered as a completion of his covenant, he shall be presumed to have done it with such intention. Hence, where *A.* covenanted for himself and his heirs with certain trustees, to lay out a sum in the purchase of freehold lands and tenements in fee-simple in possession, with their consent; and, subsequent to the marriage, purchased at different times lands of less value than those covenanted for, and died without making any settlement; the after-purchased freehold lands, though not of the amount of those covenanted for, were held as *part performance* of the covenant; as it was doubtful whether one entire purchase could be met with for just the sum covenanted to be laid out.

Nor is it considered necessary that every parcel should be conveyed

[*83] so soon as bought, as it was never *intended that there should be several settlements under the same articles.(*s*) And even if the money covenanted to be laid out in lands has been paid to the trustees, or part only has been paid over to them, and part remain in covenant, and the covenantor himself purchases the lands, such lands have been taken in satisfaction for the covenant; though, as to this circumstance, in the case of *Sowden* v. *Sowden*,(*t*) the Master of the Rolls declared, that if it had been *res integra* he should have thought the distinction worthy of great consideration.

Nor will it alter the case that the money is to be laid out with the consent of the trustees, and no consent be given; or within a specified time, and the purchase be not made within that time; as the trustees not

(*n*) 2 Vern. 558.
(*o*) Deacon v. Smith, 3 Atk. 323.
(*p*) Roundell v. Breary, 2 Vern. 481.
(*q*) Wilcocks v. Wilcocks, ut supra.
(*r*) 3 P. Wms. 211, Forr. 80.
(*s*) Lechmere v. Carlisle, ut supra.
(*t*) 1 Bro. C. C. 582, and 1 Cox, 165, and Cox's note, 3 P. Wms. 228.

enforcing by the means in their power a performance of the articles or covenant, ought not to prejudice the rights of third persons.(*v*)

As equity considers a bond in consideration of marriage as an agreement, when it is decided at law that there has been a breach of the condition of the bond, the obligee will be entitled to such compensation or performance as a court of equity may decree. And where one of the conditions was,(*w*) that if the marriage should take effect, and *J. P.* the husband, *at any time during his natural life should become seised* of any messuages, tenements, lands, and hereditaments, in possession, and should settle the same on *M. T.* his intended wife, and the issue of the said intended marriage, by such good conveyances in the law as counsel should *advise, in such parts and proportions, and to such use and uses as should be thought requisite, the better to [*84] make provision for *M. T.* in case she should happen to survive *J. P.*, then the bond to be void; the wife died in her husband's life-time, and he, having again married, subsequently became seised of freehold estates of considerable value, and disposed of the greater part of them amongst the children of the second marriage; and as the obligation to make a settlement on the wife and the issue, clearly included an obligation to make a settlement on the issue, after the death of the wife, the lands purchased after the death of the wife were held to be comprehended in the bond, and the words during the natural life of the covenantor were not construed to mean during the first coverture: and the parties were held to be entitled to a relief in equity.

But such bond, conditioned to settle lands of which the obligor shall become seised, will not affect lands of which he is seised at the date of the bond, nor be construed to affect lands to which he has only an equitable title.(*x*) If the words of the articles are future, the lands then in the possession of the covenantor will not be affected by them.(*y*)

The lands must, however, be similar in their nature to those covenanted or articled to be settled, so as to answer the purposes of the settlement.(*z*) Hence, under a covenant to purchase and settle lands of inheritance in fee simple, the purchase of leasehold estates for lives,(*a*) or years,(*b*) or reversions expectant on estates *for lives, will [*85] not be held as a part performance of the covenant, unless, perhaps, they (the latter) fall into possession in the covenantor's life-time.(*c*)

Neither will houses in London, nor lands of the tenure of borough-English, go in satisfaction of a covenant to settle "lands of inheritance in fee;" and it seems that ground rents and tithes will not be part performance of such a covenant.(*d*) Neither will copyhold estates go in part performance of a covenant to purchase freehold lands, where the nature of the tenure would prevent a compliance with the terms of the settlement; as, where the estate is to be settled on one for life, without im-

(*v*) Lechmere v. Carlisle, ubi supra.
(*w*) Prebble v. Boghurst, 1 Swanston, 309. Cusack v. Cusack, 5 Bro. P. C. 116. Banks v. Ivers, 5 Bro. P. C. 127.
(*x*) Prebble v. Boghurst, 1 Swanston, 309. Cusack v. Cusack, 5 Bro. P. C. 116. Banks v. Ivers, 5 Bro. P. C. 127.
(*y*) Ibid.
(*z*) Attorney General v. Whorwood, 1 Ves. sen. 534. Lewis v. Hill, 1 Ves. sen. 274.
(*a*) Lechmere v. Carlisle, ut supra.
(*b*) Alleyn v. Alleyn, 2 Ves. sen. 37.
(*c*) Vide Sugden on Vendors, 613.
(*d*) Lewis v. Hill, 1 Ves. sen. 274

peachment of waste; nor will the moiety of a house be considered a satisfaction.(*e*) Where, however, the covenant is to settle "lands" generally, copyhold estates have been held to go in part performance.(*f*) But Lord Hardwicke doubted, whether copyhold lands could go in performance, as they were liable to different tenures and to forfeiture.(*g*)

If the purchase is made at the time of the articles, and with a *bonâ fide* intent to pursue the articles, the value will be taken *at the time of the purchase;*(*h*) and it would even appear, that if the husband makes an extremely improvident purchase, the rent of which is not at all equal to the amount of the interest of the sum articled to be laid out, equity will not supply the deficiency;(*i*) but if the lands are suffered to descend, so as *to form a constructive performance of the covenant or articles, equity will inquire the yearly value *at the death of the testator*, at which time they became a part performance *pro tanto.*(*k*) But such a construction would not be made to the prejudice of purchasers, for if the covenantor sell the estates, it will be evidence of his intention that they should not be bound by the settlement; and therefore, they could not be followed in the hands of purchasers.(*l*)—Nor is it any objection that the arrangement will affect specialty creditors, for it is in the power of the owner of the estate to prefer one specialty creditor to another, because none of them have any specific lien on the lands.

[*86.]

Lastly, it may be added, that if a man agree with any one to build on or repair his property, the heir will be entitled to come upon the executor for the benefit of the covenant.(*m*) And so, in the case of money to be paid on an insurance for fire, if tenant in fee or in tail die before the money be paid by the office, the heir at law, or issue in tail, will have a right to the money, in order to repair the loss to the estate.(*n*)

[*87]

*CHAPTER V.

OF THE CONSEQUENCES OF A CONVERSION OF REAL ESTATE INTO PERSONAL. EFFECT OF THE STATUTE OF FRAUDS, &c.

In the consideration of the consequences of a conversion of real estate into personal, our attention will be principally and almost exclusively drawn to the claims of the different representatives of the person whose property is in this state of transition; and in attempting to ascertain these claims, though we shall have occasion to enter into the extensive learning of resulting trusts, we shall endeavour to confine ourselves to that branch only which springs from a conversion of real estate into per-

(*e*) Pinnell v. Hallet, 2 Ves. sen. 276, & Ambl. 106.
(*f*) Wilks v. Wilks, 5 Vin. Abr. 293, fol. 39.
(*g*) Attorney General v. Whorwood, 1 Ves. sen. 540.
(*h*) Pinnell v. Hallet, 2 Ves. sen. 276.
(*i*) Tunbridge v. Teather, 1 Vern. 345.
(*k*) Pinnell v. Hallet, supra.
(*l*) Deacon v. Smith, 3 Atk. 323.
(*m*) Holt v. Holt, 2 Vern. 322.
(*n*) Per Lord Thurlow in Rook v. Worth, 1 Ves. sen. 460

sonal, either by deed or by will; nor do we conceive that questions arising out of charges on land will strictly come within the limits of this essay.

It is true that a charge on lands may amount to a conversion out and out, and the difference between a charge for the exemption of the personalty, and a conversion out and out, is virtually and substantially exploded. Lord Talbot says, "A difference has been taken between the bare charging of the real estate, and a devise to sell; but I think, that in equity, a charging of the real estate is almost equal to a devise to sell; as the Court will, upon the necessity of a sale, order it so."(*a*) And so it has again been laid down, that, in order to exempt the personal estate, there is *no substantial or general difference between [*88] the cases where a man has charged his real estate with payment of his debts, and where he has directed it to be sold for that purpose:(*b*) And Lord Redesdale says, If I devise an estate to be sold to pay debts, and then the surplus to *A. B.*, *A. B.* has a right to prevent the sale, paying the debts for which it is to be sold; and, therefore, it is as much a devise to *A. B.* as if given to *A. B.*, subject to these charges; and consequently, in effect, is nothing more than a charge, and if the residue had been undisposed of, the heir at law would take it, and might likewise prevent a sale by defraying the charges.(*c*) But the analogy seems to rest here; for, although an estate that had descended would be applied in relief of an estate charged with the payment of debts, yet such would not be the case when an estate is devised out and out to pay debts.(*d*) And again, a charge in case of failure, sinks into the estate, for the benefit of the person taking it; but the money applicable to a particular purpose in a conversion of real estate into personal (unless it is an absolute conversion,) will go to the heir at law of the testator. And so, also, as we shall see hereafter, when legacies are charged by will on an estate, they may be altered, at the discretion of the parties, by an unattested codicil; but where land is converted for particular purposes, the alteration of those purposes is the exercise of a dominion over an interest in the land, which the statute of frauds will prevent, unless by a codicil duly attested. A charge is fluctuating in its nature, but a given *purpose, to which the produce of real estate is to be applied, [*89] being substantive and invariable, must require those ceremonies in the alteration of it which the charge would not: we shall not, therefore, introduce the consideration of charges on land into the present chapter, more than is absolutely necessary for the illustration of those points in which a charge and a conversion appear to be similar in their effects.

And 1st, as to the consequences of the conversion of real estate into personal, when effected by deed.

When real estate is conveyed to trustees in order to be converted into personal, for the payment of debts, or for the purpose of division, &c. if the grantor should happen to die intestate before the estate is actuallly sold, or even contracted for, it not unfrequently becomes a question whether the surplus should belong to his real or personal representative.

(*a*) Stapleton v. Colville, Forr. 201. (*b*) Inchiquin v. French, Amb. 38.
(*c*) M'Cleland v. Shaw, 2 Sch. and Lef. 538, et vide Noel v. Lord Henley 1 Dan. 220.
(*d*) Powis v. Corbit, 3 Atk. 555. Donne v. Lewis, 2 Bro. C. C. 257. Manning v. Spooner, 3 Ves. 114. Harwood v. Oglander, 8 Ves. 106.

But, as every interest in land undisposed of at the death of the grantor will pass to his heir, it follows, that whether there is a direction by deed for trustees to convert real estate into personal, *after the death of the grantor*, or the direction be not limited as to time, and the conversion has not been effected *until after the death* of the grantor, the general principle will equally apply; for, in both instances, the surplus above the requisite purposes for conversion is an interest in land at the death of the grantor, and will, in case of no appointment, or of an illegal appointment of it, result to the heir at law. As, where(*e*) *J. A.* conveys several lands to *trustees and their heirs, upon trust to sell *the same after his death*, and, out of the money arising by such sale, to pay off a mortgage which was upon the same estate, and other debts by specialty, and several other sums of money; and, after payment thereof, directed that the overplus of the money should be divided amongst certain persons therein mentioned, share and share alike, after deducting a sum of 200*l.*, which should be liable to a note under his hand; but, dying intestate, without any disposition of the 200*l.*, the question was, whether the 200*l.* should be distributed according to the Statute of Distributions, since the intestate had directed the whole estate to be sold, and turned into money, and when that was done, then this 200*l.* was to be subject to his appointment; and, although he had made no appointment, yet it ought to be looked upon as money, and so part of his personal estate, and to be distributed to the next of kin: but it was decreed by the Master of the Rolls, and afterwards affirmed by the Lord Chancellor, that it should be a resulting trust for the heir at law, since no rule whatsoever was more certain and invariable than that the heir at law should have such interest in lands as was not actually disposed of by his ancestor.

[*90]

So, also in the case of *Roper* v. *Radcliffe*,(*f*) where there *was a conveyance to trustees and their heirs, in trust to sell the lands for the payment of debts, and other purposes, and the overplus to be paid as the grantor should, by any writing, appoint. The grantor, reciting the deed in his will, made an unlawful appropriation of the surplus produce, and it was held that it resulted to the heir at law. Here, indeed, although the trustees might have sold the lands at any time, yet it appears, by the pleadings in the cause, that they were not sold at the grantor's death; and, consequently he had an interest in the lands up to the time of his death; which interest, in strict conformity to the general principle, was held to descend to his heir at law.

[*91]

This principle, which has constantly been acted upon, from the early

(*e*) Emblyn v. Freeman, Pre. Cha. 541. It would appear, from the similarity of the circumstances, and the date of this case, that it is the same as the anonymous case reported in Comyns, 1 Vol. 345. If that be so, the anonymous case is incorrectly reported; for, in the conveyance to the trustees, the power to sell was not given to the trustees till after the death of the grantor; and, therefore, the surplus produce that might arise from the sale was, at the time of his death, an interest in land, which not being disposed of, would go to his heir at law; but if by a conveyance the sale might have been effected at any time, and had taken place in the grantor's lifetime, his interest in the surplus must have been personal, and would have therefore gone to his personal representative. Vide Hewit v. Wright, 1 Bro. C. C. 86, and post. Chap. VI. It was necessary, therefore, to have inserted the time when the conversion was directed to take place, or when it actually occurred, to understand properly the principle of the decision.

(*f*) 10 Mod. 230, S. C. 9 Mod. 167. 181. 5 Bro. P. C. 360, & 1 Strange, 267.

cases(*g*) down to the present times,(*h*) must be distinguished from that which we shall notice hereafter,(*i*) where the interest under a deed, absolutely directing a conversion of property for any purpose, has vested in any one, but who died before he became actually possessed of such interest; for, in the former instance, we must observe, the interest passed to the grantor's heir, because it was an interest in land at the grantor's death, but when it vests under the deed, absolutely requiring a conversion, such interest will pass to the personal representative, and not to the heir of the person so failing.

2dly, In the conversion of real estate into personal, by will, as such a conversion cannot take effect until the death of a testator, and the heir at law is entitled to every interest in land, which is at that time undisposed of, it is clear that the produce of an estate which a *devisor directs to be sold can never be part of his general [*92] personal estate. He may, as between his real and personal representatives, declare what it shall be after his death; but since it was never in his possession as his personal estate, unless he has actually and eventually made such declaration, every interest in land which remains undisposed of will result to his heir at law. And, although it was formerly a rule with the courts of equity to be governed so entirely by an implied intention of the testator, that if in the will a legacy had been given to the heir at law, that fact was assumed to be a sufficient indication of intention that he should be deprived of the unapplied produce arising from the sale of the testator's real estate,(*k*) such a legacy being held to deprive the heir at law of the surplus undisposed of, in analogy to the case of an executor who, having a legacy, is deprived thereby of the beneficial interest in the undisposed of personal property; yet, at the present day, a very different principle, and one of much readier and more certain application, governs the modern decisions; and the fact of the heir at law taking a legacy will by no means deprive him of his benefit in the undisposed of interest in land.(*l*) But this supposed analogy is so far from being accurate, as to lead to results perfectly irreconcileable with an established principle of law; for it is impossible to contend that the heir at law is not absolutely entitled to every interest in land not disposed of by his ancestor; since, unless the testator has made an actual disposition in favour of another, or unless he has actually disposed of all his real estate, and has *made an universal [*93] heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *à fortiori* where he has expressed no intention, to the *hæres natus*.

Where a testator means with regard to a particular purpose to convert his real estate into personal, if that purpose cannot be served, the Court will not infer an intention to convert the estate for any other purpose not expressed; it being a rule in equity that where real estate is directed to be converted into personal, for a purpose expressed, which purpose fails, either wholly or partially, in the former case, though the estate has been converted, the whole produce of that conversion will still be considered

(*g*) Culpepper v. Aston, 2 Cha. Cas. 115.
(*h*) Hewit v. Wright, 1 Bro. C. C. 86. (*i*) Chapter vi.
(*k*) North v. Crompton, 1 Cha. Ca. 196. Cunningham v. Mellish, 2 Vern. 246.
(*l*) Cruse v. Barley, 3 P. Wms. 20. Kellet v. Kellet, 1 B. & B. 533. Randall v Broke, Cha. Pre. 162.

as real estate; and in the latter, as far as the purpose fails, so far the money is to be considered realty, and not personalty.(*m*)

Hence, whenever, for any specific or general purpose contained in a will, land is thereby directed to be converted into money, and the intention of such conversion is wholly or partially disappointed, whether by silence or inefficacy of the will, or by lapse in the testator's lifetime, the consequence will be a resulting trust for the heir at law, of so much of the produce as is inapplicable from any of the preceding causes, to effectuate the testator's purpose; for as the reason of the purpose has ceased, the purpose itself should be taken to have ceased.

And 1st, let us consider the failure of a specific part of the testator's interest by the silence of the will, directing a conversion of real estate into personal.

[*94] In the case of the city of *London* v. *Garway*,(*n*) *T. G.* *devised several lands to three trustees and their heirs, upon trust to sell and dispose of the monies to be raised by such sale, to such persons as he should by a paper to be signed by him, direct and appoint; and he provided that if he left no such paper of appointment, then the trustees should stand seised for the benefit of his four nephews; and if any of the appointees died before sale and payment of the money, such share should go to his nephews; the testator, by a paper signed by him, appointed his trustees to pay several sums of money to several persons, which did not exhaust the produce of the land; and it was decreed, that so much as was undisposed of should not go to the nephews, but result to the heir at law; since, to disinherit an heir at law, there must be either express words or a necessary implication.(*o*)

Nor need the land be turned into personal estate, nor more sold than is necessary to pay the legacies, &c., if there is no disposition of the surplus, and the heir chooses to take the land, paying off the charges. As where a man, by will, devised his lands to trustees(*p*) and their heirs, upon trust that they should permit the wife to receive the profits during her life, and after her death should sell the lands, and out of the money arising by such sale, should pay 150*l.* to *J. S.* and 100*l.* to his heir, and made his wife executrix; although it was urged on the reasoning formerly used, that, there being a particular sum given to the heir out of the land devised to be sold, it should exclude him from any more of the lands, as a particular legacy excludes an executor from the surplus, by the con-

[*95] struction of the Court; yet it was held *that, as to the surplus of the money to be raised by the sale of the land, that devise was but in the nature of a mortgage or security, and that the heir paying those legacies might have the land, though he had a particular legacy thereout.

And if there is a necessity that the executors should sell the lands, they will be considered as trustees for the heir at law of this undisposed of surplus. As, where(*q*) *P. S.* devised lands to his executors and their heirs, in trust to be sold by them for the best price, and with the money to pay his debts, legacies, &c., and amongst the legacies he gave one to each of his co-heirs; the Lord Chancellor held, that though they were

(*m*) Hill v. Cock, 1 V. & B. 173. (*n*) 2 Vern. 571.
(*o*) Vid. 13 H. 7. p. 13, and Bro. Abr. 52, tit. Devise.
(*p*) Randall v. Bookey, Chan. Prec. 162. (*q*) Starkey v. Brooks, 1 P. Wms. 390.

express legacies given to the heirs at law, and none to the executors, yet, the will being that the executors should sell the estate for the best price that they could get for the same, the devisees were never intended to be the owners; and they were, therefore, held to account for the surplus to the heirs at law; for when an estate is devised to trustees, in trust to sell and pay debts, &c., and no disposition is made of the residue, the benefit of the residue descends to the heir at law, because the devise is also taken to be simply a charge, and the estate so far remains real, notwithstanding; the beneficial interest goes to the heir, and the trustees are trustees for him, subject to the charges imposed on the estate by the will; and the heir may redeem by paying those charges, and prevent a sale.(*r*)

And where(*s*) a testatrix devised her real estate to be sold, and all her estate to be converted into money, *which "I give and devise as follows," she then gave several legacies; the purposes of the will were all satisfied, without having recourse to the real estate, which was not sold; the next of kin claimed against the heir, but as no purpose remained for which the real estate should be converted, it was decreed to go to the heir as land. [*96]

And likewise the produce of part of a rent-charge undisposed of will equally result to the heir at law. As, where one devised a rent-charge to be sold to pay legacies, amounting to 800*l.*; and if the rent-charge should sell for 1000*l.* he gave a further legacy of 200*l.* The rent-charge was considered worth more than 800*l.*, and less than 1000*l.*, and this excess above the 800*l.* was held to be a resulting trust for the heir at law.(*t*) And if the lands are devised to be sold for the payment of debts, in aid of the personal estate, in the event of the personal estate being sufficient to discharge the debts, the heir at law will take the lands as unsold.(*u*)

Nor will the case be altered where the conversion is formed out of the *residuary* real estate; every devise of real estate, though in form residuary, being specific. As where(*v*) a testator after several legacies, gave all the rest, residue, and remainder of his real and personal estate, to his executors, to sell and dispose of his houses and lands to the best advantage, and for the most money, and to place the money arising therefrom, as well as the rents and profits thereof, in the meantime, out to interest, "upon the best security they could get for the same; and thereout, and out of the *remaining part of my personal estate, pay *B. M.*, during her life, an annuity, &c. And as to al the rest and residue of the money which shall be then out at interest, I do hereby order and direct, that the same shall remain out at interest, for and during the life of *M. S.*, and in case she shall live separate and apart from her husband *W. S.*, then and in such case I order and direct that the yearly interest arising from the said surplus-money shall be paid to her sole and separate use; but in case she shall live with her said husband, then, in such case, as therein mentioned." *M. S.* continued to live apart from her husband from the death of the testator until her own death; and it was urged that the testator not having disposed of the residue of his real and personal estate (the real estate being by the will [*97]

(*r*) M'Cleland v. Shaw, 2 Sch. & Lef. 538.
(*s*) Chitty v. Parker, 2 Ves. jun. 271.
(*t*) Stonehouse v. Evelyn, 3 P. Wms. 252.
(*u*) Buggins v. Yates, 9 Mod. 122.
(*v*) Robinson v. Taylor, 2 Bro. C. C. 589.

directed to be sold, and having been converted into money) it was distributable, at the death of *M. S.*, amongst the testator's next of kin; but the Lord Chancellor said that he did not see how the personal representative could ever get at that which was not personal at the death of the testator, but by an express direction; therefore he thought the heir at law was entitled to the residue of the real estate, as a resulting fund.

Nor is it material if the testator(*w*) does not express merely that his real estate shall be sold and converted into personalty; but taking both funds, his residuary real estate and his personal estate, blends the two, and directs the whole to be turned into money by his trustees; and out of the money arising therefrom, "in the first place," to pay and reimburse themselves all reasonable and necessary costs, charges, and expenses [*98] *whatsoever, which they should or might be put to, in the execution of his will, or the trust reposed in them, and does not afterwards express any ulterior purpose to exhaust the entire produce: for if there is nothing more in the expression of the purpose than the satisfaction of those expenses, the money remaining unapplied, as not being required to answer the purpose, would, as far as it was derived from real estate, be considered as real, not personal property. And although it was said, that if a testator simply directed the conversion of his real estate, expressing no purpose whatsoever, with reference to which that conversion was to be made, the inference was necessary that he had the purpose of conversion, and no other, and that using the words "in the first place," and not afterwards expressing any ulterior purpose, the next purpose must be supposed to be merely that of making the conversion; yet the Court was of opinion that, upon the construction of those words, "in the first place," it could not hold that the principle upon which, hitherto, property, in the form of personalty, had been given to the heir, should be denied in this case, and that the distinction upon these words was much too slight to take this case out of the general principle: so much, therefore, of the residue of this money as arose from real estate was to be considered as real, and to belong to the heir.

So, where there is a devise of real estate for the payment of debts, the surplus undisposed of will go to the heir at law.(*x*) And where(*y*) a testator devised real and personal estate to his executor, to pay his debts and legacies, the rest and residue to himself, the only purpose [*99] *of devising the real estate appearing by the words, "My situation is such, that I am obliged to make a will, for if I should do otherwise than well, my heir would come in for all my lands, and my just debts would remain unpaid," to be only to insure payment of the debts, without any intention to disinherit the heir, he was held to be entitled to the surplus of the real estate.

And where, after a devise of real and personal estate to *J. F.* and *M. S.*, upon the especial trust and confidence that they should pay certain annuities, the testator added, that he appointed them executors of his last will and testament, and their heirs, executors, and administrators, upon the especial trust and confidence that they should devote all his property, *both real and personal*, to the payment of his just debts, and all the le-

(*w*) Hill v. Cock, 1 V. & B. 173.
(*x*) Bristol v. Hungerford, 2 Vern. 644.
(*y*) Halliday v. Hudson, 3 Ves. 210.

gacies and annuities given by him in trust to them, these executors were not to be considered otherwise than as executors in trust; and would not, therefore, exclude the heir at law from so much as was constituted of real estate, and remained undisposed of for the purposes of the will.(*z*)

Where the devise fails from inefficacy the heir at law will likewise be entitled; for whenever land, or any interest in land, which would descend to the heir at law, is devised for purposes which the law will not permit to take effect, the heir at law will have the benefit of the interest, as undisposed of, whether the testator intended he should have it or not; for the heir at law takes whatever is undisposed of, not by force of the intent, but by the rule of law. As in the case of the *Attorney General* v. *Weymouth*,(*a*) where a testator devised to trustees all and every his manors, messuages, lands, tenements, and *hereditaments, both freehold and copyhold; and all his real estate whatsoever, in trust to sell and dispose thereof, and the rents, issues, and profits, in the meantime, and until such sale, (all necessary charges being deducted,) unto such person or persons, and for such uses, intents and purposes, as he had thereafter given and bequeathed the same; and after the bequest of certain legacies, he gave and bequeathed all the monies to arise by the sale of his real estate, and by the rents and profits thereof in the meantime, and until such sale, and also all his personal estate, unto his trustees, to pay over one equal moiety thereof to the governors of the Hospital of Bethlem, in London; and upon trust to pay over the other moiety thereof to the treasurers of St. George's Hospital. The heir at law having pleaded the Statute of Mortmain,(*b*) that plea was allowed; and such disposition being within the spirit and meaning of the act, the produce of the real estate was held to result to the heir at law. [*100]

So, likewise, when the trusts are not void in their creation, but in the events which have happened, the disposition proves unlawful,(*c*) the heir at law will also be entitled to the benefit of the real estate. And where(*d*) a testator directed a share in the Bath Navigation to be sold, and the money to be applied to the improvement of the city, this bequest being void under the statute just alluded to, was held to be a resulting trust for the heir at law.

*In the case of *Middleton* v. *Cater*,(*e*) *J. C.*, who was a freeman of the city of London, devised his real estate without the limits of the city, to trustees to sell, after his wife's death, and after certain legacies, he directed the residue, in case it should amount to 1000*l.*, to be laid out in the purchase of lands, and the rents, issues, and produce arising therefrom, to be for ever applied in augmenting the weekly allowance to the poor of a certain hospital, called Jesus Hospital; and if the residue was larger, he directed a larger proportion to be paid to the said purpose; and as the custom of the city was only a personal privilege in the freeman, and could not extend to lands out of the city, so as to exempt them from the effect of the Mortmain Act, it was decreed, as to this residue, that there was a resulting trust for the heir at law, as [*101]

(*z*) Southouse v. Bate, 2 V. & B. 396.
(*b*) 9th Geo. 2. c. 36.
(*d*) Howse v. Chapman, 4 Ves. 542.
(*e*) 4 Bro. C. C. 409.
(*a*) Amb. 20.
(*c*) Tregonwell v. Sydenham, 3 Dow. 194.

to so much of the intended provision for the charity as consisted of real estate, and for the next of kin as to so much as was personal.

And where there is a special disposition by a will of the money to be produced by the sale of real estate, if this disposition fail by lapse, the unapplied produce will equally result to the heir at law. (*f*)

The case of *Ogle* v. *Cook*(*g*) was long considered to contravene these authorities; but it appears from the words of Lord Loughborough in *Collins* v. *Wakeman*,(*h*) that such was not the case. The facts of the case, as there stated, were these:—Cook, after directing by will certain parts of his real estate to be turned into money, and the produce to be laid out in stock, subject to the payment of his debts, gave the interest to his wife for life; and, after her decease, the principal to his daughters,

[*102] *taking notice, that his heir was otherwise provided for: He afterwards conveyed the same estate, which he had previously devised, to a creditor, to whom he had assigned a mortgage which covered the estate devised, and a little more; and he directed the estate to be sold to pay the debts; it was an absolute conveyance for a sum of money, but, by a defeasance, the person to whom the estate was conveyed, was directed to account, after satisfying the debts, to Cook himself. The question was, whether the devise was not revoked. Lord Hardwicke held, that it was not revoked by the deed, which, in fact, did what the testator had by his will directed to be done; but the bill stated, that without carrying into execution all the purposes of the agreement, and reducing the whole into money, there would not be sufficient to pay the debts and legacies; and Lord Hardwicke only decreed, that the remainder, after satisfying the particular debts, should be taken as part of the personal estate; and directed an account of the personal estate, including in it the produce of the real, and an application; and he reserved the consideration of what should be done with the surplus till after the report. Therefore, the only point which applies to the list of cases now under consideration, was left undecided. Consequently, it does not stand in contradiction to them, nor to the rule, that, where the Court has no direction from the testator to whom the money arising from the sale of any part of his real estate shall go, it rests with his heir at law.

Hence, when the real estate of a testator is converted into personalty for the particular purposes of the will, whether such purposes take effect or not, so much of the real estate of the produce thereof as is not effectually disposed of, either at the time of the testator's death, or in the

[*103] *events that have happened, (whether from the silence, inefficacy of the will, or subsequent lapse,) will result to the heir at law.

Nor, if there be a residuary disposition, will this surplus, arising from the conversion of the testator's real estate, after the particular purposes are answered, so form part of the personal estate as to pass by the residuary clause; for, as a conversion by will cannot take effect till after the death of a testator, properly speaking, nothing is his personal estate which was not so at his death: and although he certainly may express himself in such a manner as to show that he intends this surplus to fall into the residue, yet, unless he has done so, where there is a direction to sell land,

(*f*) Gibbs v. Ougier, 12 Ves. 413.
(*g*) Cited 1 Bro. C. C. 501. (*h*) 2 Ves. jun. 686.

with an application of the money to a particular purpose, and a subsequent disposition of the rest and residue of the personal estate, it appears there is no case in which it has been held that the surplus, after the particular purpose is answered, forms part of the personal estate, so as to pass by the residuary clause.(*i*)

Indeed, upon principle, it is impossible that such surplus can pass by a residuary bequest; for this surplus must be considered as an interest in land, and a residuary devise is constituted on very different principles from a residuary bequest, for a will as to personal estate speaks at the time of the death of the testator, and the residuary legatee takes not only what is undisposed of by the expressions of the will, but that which becomes undisposed of at the death, by disappointment of the intention of the will. But it is otherwise as to the residuary devisee of real estate, or of the price of real estate. As to him the will speaks only at the time of making it, and he *can take nothing but what is at the time intended for him. As to personalty a will is ambulatory till the testator's death, but as to realty it speaks from the date; therefore, a residuary devisee cannot take a lapsed devise, but a residuary legatee takes everything that lapses; and hence arises the necessity of ascertaining clearly the intention of a testator, whether he means the produce of his real estate to be considered as personalty, not only for the express object, but in the event of that failing, for the purposes of his residuary disposition; and unless that intention can be gathered, either by express words or by necessary implication, the heir at law must be held entitled to it as a resulting trust. [*104]

Where a testator(*k*) devised his estate upon trust and confidence that, as soon as conveniently could be after his decease, his widow should sell and dispose of the same, and invest the money arising therefrom in real or government securities, or in the public funds, at her discretion, the interest and dividends of the same to be to her use; and subsequently gave and bequeathed all *his effects, whatsoever and wheresoever*, for her maintenance, upon full trust and confidence in her justice and equity that, at her decease, she would make a proper distribution of what effects might be left in money, goods, or otherwise to his children; and appointed her executrix: it was held that this could not be construed into a declaration of the trust of the money produced by the sale of real estate, beyond the life of the wife, and that it must, therefore, result to the heir at law of the testator.

*So, likewise, where a testator devised his real estates to *W. C.* and his heirs, in trust to sell the same, and declared that the money arising by such sale should be considered as part of his personal estate; and thereout, and out of his personal estate, he gave several legacies, and, among others, to all his next of kin, and his heir at law; and he devised several copyhold estates to the same trustee, to sell as early as possible; and directed the whole of the money arising from such sale to be considered from thenceforth as other part of his said personal estate, and to be disposed of by his said trustee and executor in manner following: He then gave, among other legacies, out of his trust-monies and personal estate, the sum of 1000*l.* to his executor, to be disposed of according to any instructions he might leave in writing; and [*105]

(*i*) Maughan v. Mason, 1 V. & B. 410. (*k*) Wilson v. Major, 11 Ves. 205.

gave all the rest and residue of his goods and chattels, personal estate and effects, whatsoever and wheresoever, as therein was mentioned. The testator died, leaving no instructions with regard to the 1000*l.*; and the Court was clear, that where there was no direction from the testator to whom the money arising from any part of his real estate should go, it remained with his heir at law, and, therefore, neither the residuary legatee or next of kin could establish their claim to it.(*l*)

And where the real estate was devised as an auxiliary fund for legacies, and the testator appointed residuary legatees, yet the residue undisposed of was held to be a resulting trust for the heir at law, and could not, without some express words, or a necessary implication, belong to the residuary legatee.(*m*)

[*106] *It must be equally clear, that where the particular purpose fails from inefficacy, the residuary legatee will not be entitled to it; but this surplus must also result to the heir at law. As where a testator devised lands to be sold, and part of the money arising by the sale to go to a charitable purpose, and the residue of the money was given over, it appearing that the devise to the charity was void, the produce to be applied to it was not considered as forming part of the residuary estate, but resulted to the heir.(*n*)

So, where a testatrix gave directions as to all the residue and remainder of her real estate, to sell the same, and, out of the monies to be produced by the sale, to pay certain legacies; and then to lay out the sum of 800*l.* in landed property, for the use of certain charities mentioned in her will, and to pay all the rest, residue, and remainder of the monies to arise from the sale of her real estates, to *J. R.*, for his own use and benefit, the Vice Chancellor held that the devisor at the time of making the will, intended that the residuary devisee of the price of the land should take such residue, subject to the deduction of 800*l.*, which was, therefore, undisposed of, and belonged to the heir.(*o*)

Nor, if the particular legacy fails by lapse, can it fall into the residuary disposition, unless by express words or necessary implication. As where *A.*, having five children, divided all his freehold and copyhold lands, in trust to sell the same, and to pay off all incumbrances upon the premises, and also all his just debts: he likewise devised all his personal estate to

[*107] the same *trustee, in trust to sell to the best advantage, and, after his debts were paid, to apply the money arising by sale of his personal estate, and also the money to be produced by sale of his real estate, amongst his five children; to his eldest son, 200*l.*, which the testator gave him at his age of twenty-one; all the rest and residue thereof to and amongst his other children. The eldest son died unmarried, and under twenty-one; and it was decreed that this residuary disposition to the children could not be construed to include the interest in land, which had lapsed by the death of the eldest son, but that it must descend and go to the heir, as if so much land as was of that value was not directed to be sold, but suffered to descend.(*p*)

If, therefore, real estate is directed by will to be converted for any pur-

(*l*) Collins v. Wakeman, 2 Ves. jun. 683.
(*m*) Kellet v. Kellet, 1 B. & B. 533. Maughan v. Mason, 1 V. & B. 410.
(*n*) Gravenor v. Hallum, Amb. 643.
(*o*) Jones v. Mitchell, 1 S. & St. 290, et vide Gibbs v. Ramsey, 2 V. & B. 294.
(*p*) Cruse v. Barley, 3 P. Wms. 20. Hutcheson v. Hammond, 3 Bro. C. C. 128.

pose, although the will may contain a residuary disposition of all the testator's property, yet, when that purpose fails, from silence, inefficacy or lapse, this residuary clause does not necessarily prevent so much of the produce as was to be applied for that purpose from resulting to the heir at law, as an interest in land. The testator may, indeed, either by express words or a necessary implication, direct that the produce of the real estate shall be considered as personalty, *not only* for the *particular purpose*, but also *for the purpose of his residuary disposition;* and we shall now proceed to inquire what will be considered by a court of equity as a conversion, as well for the particular purpose as for the residuary disposition.

In the case of *Durour* v. *Motteux*,(q) *T. M.* by will blended all his real and personal estate, and devised to *trustees all he had, [*108] or might have or claim, of what kind soever, upon trust to sell and dispose thereof; and after payment of all his debts, funeral expenses, and legacies, to put or place out all the residue of his personal estate at interest, upon government or other securities, in the names of his trustees, upon trust that they should pay and apply the interest and produce thereby between the persons thereinafter mentioned, during their joint lives, with benefit of survivorship; and, after the death of the survivor, then to pay and apply the said residue and the principal unto and amongst their respective children, to be equally divided. The testator then gave several legacies, some to individuals, and others for charitable purposes, and amongst them a legacy of 12,000*l.*; and the remainder of his estate and the interest thereon being placed out at interest in some of the funds, the testator ordered the interest arising therefrom to be paid quarterly to and amongst the persons therein mentioned: and the 12,000*l.* being held void as a bequest for the charity, and it being held by the Court that the money which arose by the sale of the testator's real estate was turned into personal, and so considered by him for *all the purposes of his will*, (the testator himself describing it as all his personal estate,) the law would then give it to the residuary legatee, as it is presumable that the residuary legatee takes as well whatever is not given according to law, as whatever lapses by the death of legatees.

So, likewise, in the case of *Mallabar* v. *Mallabar*,(r) where there was a devise of real estate only, upon trust to sell, and that out of the monies arising therefrom *the testator's debts should be paid; [*109] and after the payment thereof, the testator devised, out of the remainder of the monies, certain legacies, and amongst the rest, one to the heir at law: then followed this clause;—"Item, after all my debts and legacies paid, I give and bequeath all the rest and residue of my personal estate unto my sister, *E. M.*, and I appoint her executrix." As there was more money than was sufficient for the payment of the debts and legacies, the question was, whether the surplus of the produce constituted by the sale of the land, resulted to the heir, or belonged to the executrix: and the Court inferred from the intention of the testator, as far as that could be collected from the will, that the testator meant to describe by the residuary clause, as well money strictly personal, as the money claimed by the heir, and for this reason chiefly, because, if a dif-

(q) 1 Ves. sen. 320, sed vide 1 S. & St. 292 (in note.)
(r) Forr. 78.

ferent construction was made, the executrix, to whom the testator clearly intended to give a beneficial interest, would have taken nothing but a troublesome office; for, if the words "the residue of the personal estate," did not include this money, the personal estate must have been first applied to pay the debts and legacies, in exoneration of the real estates charged therewith by the will, and the executrix would have had an office of trouble without the benefit intended her.

So, in the case of *Ackroyd* v. *Smithson*,(*s*) which we shall more particularly notice hereafter, it was held to be a conversion for all the purposes of the will, including the residuary disposition. And where a testatrix, having power under her settlement, gave by will, amongst other [*110] *things, a copyhold estate, which she had surrendered to the use of her will, to her brother, *T. A.*, and his heirs, in trust to sell, and out of the monies arising therefrom, to pay the following legacies; to her husband, *E. L.*, the sum of 150*l.*; to her brother, *T. A.*, 20*l.*; to her nephew, *J. F.*, 10*l.*, &c.; and she directed these legacies to be paid within twelve months after her decease: she also gave some personal property to be sold, and after making a disposition of the produce, proceeded, "and, as to the residue of the purchase-money arising from the sale of her said copyhold estate, household goods and furniture, and all the rest, residue, and remainder of her monies, securities for money, personal estate and effects, whatsoever and wheresoever, that she should die possessed of, interested in, or entitled to, or whereof she had power to dispose by will; she gave to her said niece, *B. K.*, her executors and administrators, subject to her debts and funeral expenses." The legacy to the husband was considered void at law, he being married at the time of his second marriage, and *J. F.* dying in the lifetime of the testatrix, that legacy also failed. The question was, therefore, whether there was a conversion, not only for the specific purposes, but for the purpose of the residuary disposition; and the Master of the Rolls, in his judgment, held, that this case came under the authorities of *Mallabar* v. *Mallabar* and *Durour* v. *Motteux*, for it was making the real estate, to all intents and purposes, personal; and then taking a retrospective view of what she had done, the testatrix meant to give everything not disposed of, and added the residuary clause; therefore this estate was entirely turned into money: the testatrix had contemplated it as such; and part of it not [*111] being *well disposed of, the residuary clause gave everything which was lapsed, or by any means not disposed of.(*t*)

But although the object be a conversion out and out, for the purpose of the residuary clause, it is necessary where a personal confidence is reposed in any one to sell the property, that the testator's real estate should be all sold, either by that person, or under his directions, or otherwise, the produce of that part only which has been sold will fall into the residue, and the part unsold will result to the heir at law; as where a testator ordered and empowered his wife to sell certain estates, with the crop in the ground or barns, and all stock, furniture, chattels, and effects, with all convenient speed; and the money arising from such sale to be placed out on security: the yearly interest of which, as well as the interest due to the said testator, or notes, bonds, mortgages, or otherwise, (except what was in the public funds,) he also gave and devised unto his

(*s*) 1 Bro. C. C. 503. (*t*) Kennell v. Abbott, 5 Ves. 802.

said wife, under certain restrictions, in case of a second marriage; and the testator, after giving several legacies, did thereby, after the decease of his wife, without issue by him, leave the whole of his personal estate, principal and interest of every kind, both on public and private security, before undisposed of, to his several nephews and nieces therein named. The testator's widow died, without issue by him: and not having married again, the question was as to the claim of the heir at law to that part of the estates which was not sold during the widow's life, and also to the money produced by the sale, as not being disposed of after the death of the wife; the residuary legatees insisting, that the residue of the *estate should be sold; and the produce of the whole go as the personal estate; and the Master of the Rolls decreed, [*112] that the heir at law of the testator was entitled to so much of the estate as remained unsold; and that the money produced by the sale of such part as had been sold was to be considered as part of the personal estate of the testator.(*u*)

In this case, it will be observed, that the real estate was not blended with any personalty, except what was in use for the purposes of cultivation; and yet it did not make any difference as to the construction of the produce being considered as personalty, for the purposes of the residuary clause,—it was the manner in which that clause was worded which must have induced the Court to consider that as personal which had been converted by the person duly authorized. Hence, if any interest in land, eventually incapable of application for the particular purpose mentioned in the will, is intended to fall into the residue, it is absolutely necessary that there be something to point out the testator's meaning, either the words themselves, or, at least, a necessary implication from the words and state of the property.

But should such a residuary disposition, as would include all the produce of real estate, in any event fail, or partially fail, the same rule will hold as if there had been a failure, or partial failure, of a particular purpose, and the undisposed of surplus will, in such case, as in the preceding instances, result to the heir at law. It is not the mere disposition of it by a residuary clause which will absolutely make the produce of real estate personal property; for, although the testator may have converted *his real estate out and out, *with reference to the qualities* [*113] *of the property which his residuary legatees were to take,* yet, as to such part of the property, as in the event they cannot take, he has not determined in its nature; but has, for anything which appears on the face of the will, left it in the state it was during his life; he has in fact died intestate; and, therefore, to say that he has made it *absolutely personal* property, and that, therefore, the law must give it to the next of kin, would be to apply an argument deduced from what was the testator's intention, in case events had taken place which have not occurred, for the sake of proving a similar intention, if circumstances had happened directly contrary to those, with relation to which only the testator framed his intention; or, to infer, that, because the testator intended his real estate should go as personal *with respect to his residuary legatees,* therefore he intended to convert *his real estate, out and out, to all intents and purposes whatsoever,* would be, to reason from a case

(*u*) Brown v. Bigg, 7 Ves. 279.

in which intention was expressed to prove a like intention in a case which supposes absence of intention; if, therefore, there is a failure, or a partial failure, of the residuary disposition under a will referring *only to the purposes contained in it*, this produce is so much money undisposed of arising from the sale of lands, and which, in equity, is considered as land. So long as there is any person to take, who is declared by the testator to be preferred by him to those whom the law appoints to succeed him, the heir can have no claim: but where the residuary disposition wholly or partially fails, and there is no declaration of intention in favour of the next of kin, the heir must take such surplus arising from the sale of lands; as nothing can entitle the next of kin to take, unless there is *some direction, or expression, in the will, that the undisposed of surplus shall be considered as personalty.

[114]

As where (*v*) a testatrix devised her real estate to trustees, upon trust that they, or the survivor of them, or the heirs or assigns of the survivor, should sell and dispose of the same, either together or in parcels, for the most money that could be got for the same; and the money arising thereby, and by the rents and profits, in the meantime, until the same should be sold, to be paid and applied as thereinafter directed; and the testatrix, after several legacies, gave and bequeathed "all the residue of her personal estate, and of the money arising by the sale of her leasehold estates, and of the rents and profits thereof, until such sale, unto Lady Legard, Jane Fisher, Lady Cayley, Mary Cartwright, and Henrietta Digby, to be equally divided amongst them, share and share alike; then, by a second codicil, (for the first made no alteration as to this residuary disposition,) the testatrix reciting the disposition of her real and personal residuary estate, and that Mary Cartwright was dead, revoked the former disposition, and gave the residuary real and personal estate amongst Lady Legard, Jane Fisher, Lady Cayley, Henrietta Digby, and Lucy Osbaldiston, to be equally divided amongst them, share and share alike; and Lady Cayley having died in the lifetime of the testatrix, it was decreed, that the fifth part of the rents and profits of the testatrix's real estate, and of the money to arise by the said sale, bequeathed to Lady Cayley, should result for the benefit of the heir at law of the testatrix. Now, here, if all the legatees had died in the lifetime of the testatrix, it would have *been competent to the heir at law to have insisted in equity, that no sale should be made of the real estate; and, therefore, if some of the legatees die, it is impossible to say, that, because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take; since, as we have seen, it is not true, that, where it is necessary that a sale should be made to effectuate the testator's purposes, which are capable of taking effect, such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention: and there is no difference between the case of an entire failure of the legatees, and the present case; except that in the former instance there is no residuary legatee as to any part of the surplus, and, therefore, a general intestacy; and in the latter there is none as to some part of it, and therefore a partial intestacy: but the effect of a partial intestacy must be the same as to the

[*115]

(*v*) Digby v. Legard, Reg. Lib. A. 1773, fol. 495.

part, as the effect of a general intestacy is to the whole; therefore, the claim of the heir at law to the lapsed shares of the produce, must prevail against that of the next of kin: nor could such shares have gone to the other residuary devisees of the produce of the real estate; they took, as tenants in common, and if it is intended that those who are entitled to this residuary disposition should take the lapsed share of that person who fails in the testator's lifetime, it is essentially necessary that words of survivorship be added. (*w*)

It will be observed, that in this case the funds constituted by the produce of real and personal property were never blended by the testatrix, but constantly kept distinct: but the blending the funds for similar purposes *will not alter the principle; and, therefore, so much of the fund as is constituted of realty will descend to the heir at law, and so much as is constituted of personalty to the personal representative. [*116]

As in a case(*x*) where a testator, after giving several legacies, blended his real and personal estate, and gave and devised the same to trustees, in trust that they should, as soon as convenient after his decease, sell all his said messuages, &c., for such price or prices as could be got for the same, and thereby convert such real and personal estate, so to them devised, and every part thereof into ready money; and by and out of the money arising from such sale, pay all his debts, legacies, and funeral expenses, and charges of proving his will: and after payment thereof, and retaining to themselves 50*l.* each, in trust, out of such monies to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after all such payments made, and putting out the fund as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expenses, and loss, which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, he directed that they, and the survivors of them, should, within six months after the same should be ascertained, pay the same unto the testator's legatees, thereby making his legatees entitled as tenants in common of the surplus which fell into the residuary disposition. Two of the legatees died in the lifetime of the testator; and the question was, whether the heir at law, next of kin, or residuary legatees, were *entitled to the lapsed legacies, they being constituted not only of personal, but also of the produce arising from the sale of real estate; now, the fact of the testator's having blended the funds, has been sometimes supposed to favour an intention of an absolute conversion out and out, for all intents and purposes whatsoever: but it would not have been possible to contend, that because a testator has blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he has therefore blended them, if, in the event, he has made no disposition; or that, because he has made the real estate personal, to give it to his residuary legatees, and to disappoint his heir, he means also to disappoint his heir, whether his residuary legatees do or do not, in the event, take the benefit of that disposition: for the act of his having blended [*117]

(*w*) Brograve v. Winder, 2 Ves. jun. 634.
(*x*) Ackroyd v. Smithson, 1 Bro. C. C. 502.

the funds, proves a purpose hostile to both the heir and next of kin; and, therefore, that fact can never be a ground from whence to infer, that, in a change of circumstances, he has a purpose of kindness and bounty to the next of kin, and adverse to the interests of the heir only; and, therefore, so much of the fund as was constituted of real estate, was held to result to the heir at law.

In the case of *Williams* v. *Coade*, part of the residuary disposition failing lapsed to the heir at law.(*y*) The only purpose for which the estate is taken from the heir at law, in cases of this nature, is to benefit the residuary devisees; then, if they cannot take it, and there is no indication [*118] of intention to take the estate from the heir *and give it to the next of kin, it must result to the former.(*z*)

So, where *S. J.* seised of real, and possessed of personal estate, gave all his lands, &c., in trust to sell, and directed the money to be laid out at interest, in the public funds, and after giving some legacies, ordered the residue of his personal estate, and the money arising therefrom, to be vested in the public funds, and there remain for the space of ten years; and, at the end and expiration of the said term, he willed and directed that the same, together with the interest and accumulations which should have accrued thereon, should be divided into six parts; one-sixth part whereof he directed to be paid to *W. J.*, son of the testator's brother, *W. J.*, or to his legal representatives; and the other five parts thereof to be divided among such of his next of kin and legal representatives as should be then living, under the usual and due course of representation. The testator died, leaving *W. J.* the elder, his only brother, surviving him, who likewise died before the expiration of the ten years; and the Lord Chancellor, considering that the testator meant such next of kin, who being alive at his death should likewise survive the period of ten years, held, that the disposition of five-sixths of the fund having lapsed must be considered as undisposed of; and that so much thereof as arose from the real estate belonged to the heir at law of the testator, and so much thereof as arose from the personal estate belonged to the personal representatives of the surviving brother, *W. J.*, the elder. It appeared, [*119] also, at the same time, that there was some *real estate unsold, which was directed to be sold, and one-sixth part of the proceeds thereof to be given to the personal representative of *W. J.*, the son, and the remaining five-sixth parts thereof to the testator's heir at law.(*a*)

Hence, we collect from the series of cases reviewed in the course of this chapter, that, as the heir at law is entitled to every interest in land not disposed of by his ancestor, whenever there is a conversion by will, for the purposes contained in it, whether those purposes are specific or included in the residuary disposition, if they fail of being carried into execution, (be the cause of their failure what it may,) so much of the real estate, or the produce arising from the sale (which is an interest in real estate,) as fails of application, according to the directions of the will, must result or belong to the heir at law; or, in the words of Mr. Cox, who has so ably expressed the result of his observations in a very celebrated note(*b*):—"The several cases on this subject seem to depend upon this question, whether the testator meant to give to the produce

(*y*) 10 Ves. 500.
(*a*) Spink v. Lewis, 3 Bro. C. C. 355.
(*z*) Hooper v. Goodwin, 18 Ves. 156
(*b*) Vid. 3 P. Wms. 21, n.

of the real estate the quality of personalty, *to all intents*, or *only* so respected the *particular purposes of the will:* for, unless the testator has sufficiently declared his intention, *not only* that the realty shall be converted into personalty, *for the purposes of the will*, but farther, that the produce of the real estate *shall be taken as personalty*, whether such purposes take effect or not; so much of the real estate, or the produce *thereof, as is not effectually disposed of by the will, at the time of the testator's death, (whether from the silence or inefficacy of the will itself, or from subsequent lapse,) will result to the heir." [*120]

It may, perhaps, be necessary here to remark, that this interest in land, although money, follows in its first transmission, the same rules of descent as the land itself, of which it is a part produce. In the case of *Hutcheson* v. *Hammond*,(c) *F. W.* having an estate, which came to her *ex parte maternâ*, on her marriage, *by lease and release*, conveyed the same to trustees, to such uses as she should direct, with remainder to her own right heirs; by will she directed the estate to be sold, the money to be laid out in the funds, and the trustees to permit the husband to receive the interest for life; then, (after the deduction of 3500*l.* for certain purposes, and the sum of 1000*l.* to *G. P.*) to pay the residue of the purchase-money as therein directed. By a codicil, she gave her husband a power of appointing the 3500*l.*, but made no mention of *G. P.*, who died before the codicil was made; and it was decided, that, as the conveyance to the trustees was an innocent conveyance, this 1000*l.* was part of the the old estate, which, having become lapsed by the death of the devisee in the lifetime of the testatrix, would descend to the heir *ex parte maternâ*.

But although a testator has directed a conversion of his real estate into personal for any of the preceding purposes, yet, in the event of an entire or partial failure in his lifetime from any causes, he can exercise no *future power over this undisposed of produce, resulting from such failure, unless by a subsequent codicil or will duly executed according to the statute of frauds. [*121]

For it sometimes occurs that a testator conceives, by his direction to convert his real estate by will regularly attested, that the conversion takes effect from the date of the will, and not from his death; and, consequently, that a paper not duly executed, according to the statute of frauds will be sufficient for any subsequent disposition of this resulting surplus.

Such an attempted disposition would, however, amount to a complete evasion of the statute of frauds.

Attempts have been made to support this disposition of the produce, by assimilating it to cases where lands charged generally with legacies by a will duly executed are liable to legacies given by an unattested codicil;(d) but the principle can bear no application to a future disposition of part of the produce of real estate. For a charge, whether for debts or legacies, is generally in aid of the personal estate, which is primarily charged. Such a charge is necessarily uncertain in its extent, not merely because the testator cannot ascertain what may be the amount of his future engagements, but because the amount of the personal estate is fluctuating. A charge for legacies must, therefore, be uncertain as to its extent, for

(c) 3 Bro. C. C. 128.

(d) Hannis v. Packer, Ambl. 556.

whatever will affect the primary fund varies the amount of the charge; therefore, though given by a will duly executed, they are of [*122] *necessity, revocable by a will not attested: for the charge upon the land is only for the deficiency of the personal to answer the legacies; if legacies are taken away, they do not come into the account; if they are added, they affect the real estate by diminishing the personal; which it is in the power of the owner to do all his life. It is obvious, therefore, that the statute of frauds does not affect the question as to legacies, because it does not prevent a man creating by will a fluctuating charge upon real estate, in aid of personal. As well cases of this kind,(*e*) as those by which a substitution of a fresh legatee for a legacy primarily charged on lands(*f*) differ materially from those where money arising from the conversion of realty by will, has been attempted to be bequeathed by an unattested codicil.

This money is, until the conversion is effected, which cannot be before the death of the testator, an interest in land; before this intended disposition of the produce by an unduly attested codicil, the testator had an absolute dominion over it; whatever passes, therefore, must pass by means of this absolute dominion; but the requisites for the due disposition under this dominion are laid down in the statute of frauds; and if, therefore, the testator exercises it without complying with them, it is, to all intents, an evasion of the statute.

In the case of *Sheddon* v. *Goodrich*,(*g*) one of the questions [*123] *there made was, whether by a direction by will to sell real estates, and after the sale to pay certain legacies, there was such a conversion out and out, as that the surplus produce would pass by an unattested codicil. The facts, as far as they relate to the point before us, were as follows: *B. G.*, by will duly attested, ordered and directed his executors to sell and dispose of the whole of his estate, both real and personal, of what nature or kind soever, and after sale thereof, to pay to each of his three daughters the sum of 6000*l.* with benefit of survivorship: the testator, then after a bequest to his son, to enable him to establish himself in business, gave all the rest and residue of his estate, of what nature soever, which should be and remain in the hands of his executors, after the performance of the directions therein before-mentioned, to his only son, and made him residuary legatee. Subsequently to the will, the testator had another daughter, after whose birth he made another will, attested by two witnesses, and by which, after expressing an intention to revoke his former will, and giving an annuity to his wife, he adds: "All the residue and remainder of my estates, wheresoever they be, must be placed at interest in the most advantageous manner for the purpose of educating and clothing my children;" and he thereby appointed executors to his will. The testator then made a codicil, likewise only attested by two witnesses, by which he gave the fund on which the annuity granted to his wife was charged, equally amongs this children at her death, and the residue of his estates to remain in the hands of his executors for the use of his children, with full power to pay each their equal proportions on or before their full age.

(*e*) Brudenell v. Boughton, 2 Atk. 268. Hannis v. Packer, Amb. 556. Habergham v. Vincent, 2 Ves. jun. 204. Buckeridge v. Ingram, 2 Ves. jun. 652.
(*f*) Atty. Gen. v. Ward, 3 Ves. 327. (*g*) 8 Ves. 481.

*Upon this, the question arose, whether all the daughters were entitled with the son to the produce of the real estate, [*124] or whether the will had so changed the nature of the real estate, that it was to be considered converted out and out, even in the life of the testator; so that he had a right to consider it as personal property, capable of disposition, as personal property; and which, therefore, might have been disposed of by a codicil unattested. The Lord Chancellor, in delivering his judgment adds, that to make this codicil pass the surplus interest of the real estate, it must be made out that a subsequent unattested paper has been held sufficient to pass an interest in money, to he constituted by the surplus of the produce of estates converted by the will. There is no such case, though there are many to the extent of debts and legacies, for it is clear, that if the testator had died without leaving any debts or legacies, the real estate would not have been to be sold; and the distinction, that it depends upon the election of the party, whether it is to be real or personal estate at the death of the testator, is true. But the question is, what it was in his life, and up to his death, and by what instrument he could have disposed of it in his life? and there is no authority to prove that it was not real estate in his life, and within the statute of frauds. His Lordship is likewise reported to have added, that the only cases in which the surplus of money, the produce of an estate converted by the will, has been held to pass, are those where the instruments, executed in the presence of three witnesses, have treated the surplus itself as comprehended in the description under the words "my personal estate;" and the Court has collected from the whole will, duly attested, an intention to give the property, which was the *surplus, [*125] after payment of the debts and legacies arising from real estate: to give his real interest in that property and surplus, in terms *primâ facie* descriptive of personal property only; but which, upon the whole taken together, the Court adjudged to be, according to the meaning of the testator, calculated and intended to pass such surplus. The cases were not carried farther than that; and he was not at liberty to extend the doctrine without an authority for it.

It is difficult, however, to ascertain from the report, what was his Lordship's precise meaning relative to the doctrine extracted from those cases, by which a testator, by a codicil not properly attested, might by any possibility create a substantive charge on a fund constituted of the produce of real estate to be converted by a will duly attested. Sir Samuel Romilly,(*h*) in argument, conceived his Lordship to have meant such a conversion of real estate that it would no longer go as such, but would, as personal property, go to the next of kin; as if the testator had expressly said, that if he should not dispose of it there should be no resulting trust for the heir. And the Master of the Rolls, Sir W. Grant, alluding to the same words, says: "There are indeed some expressions in the report of *Sheddon* v. *Goodrich*, which seem to imply that a testator may consider his real estate as by his will thrown into personalty, so that he could act upon it as if it were personal property: but I cannot conceive any such case, that a person can enable himself to dispose of his real estate or its produce by any other sort of will than the law requires to pass land.

(*h*) Hooper v. Goodwin, 18 Ves. 156.

[*126] *So, also, in the case of *Hooper*, v. *Goodwin*,(*i*) where *H. G.*, by his will duly executed, after giving certain annuities and legacies, devised several real estates to trustees in trust to sell, and invest the produce in stock, for the purpose of answering and paying, or contributing towards answering and paying, the several annuities and legacies by that his will given and bequeathed, and to, for, or upon, no other use, intent, or purpose whatsoever. The testator then gave several other annuities and legacies, chargeable on and payable out of his stock in the *three per cent.* consolidated bank annuities; and as to all the rest, residue, and remainder of his estate and effects, whatsoever and wheresoever, and of what nature or kind soever, he gave and bequeathed to his daughter, Susanna Ann Goodwin, his nephews, John and Peter Kington, and his niece, Susanna Bayly, to be equally divided between them, share and share alike.

By a codicil, attested by only two witnesses, reciting, that by his will, after disposing of his landed and other property, and bequeathing several legacies and annuities, he had given all the rest and residue as above stated; and that by the recent death of Peter Kington, his residuary estate and effects, in case of the testator's dying without altering his will, would become divisible amongst the survivors of his said residuary devisees, which was not his intention; he therefore revoked such beforementioned devises and bequests in his will, and did thereby give, devise, and bequeath all the rest, residue, and remainder of his estate and effects, after defraying certain legacies and annuities, to his daughter, his nephew,

[*127] John *Kington, his niece, Susanna Bayly, and his grand-niece, the only daughter of Peter Kington, to hold in equal proportions, share and share alike.

The Master of the Rolls, having shown that the conversion was effected for the purposes of the will, and that the share of the produce intended for Peter Kington would, under the current authorities, have gone, in case no codicil had been made, to the heir at law, stated his opinion to be, that, as he had always understood that an unattested will or codicil could have no operation upon the land, or the produce of the land, the codicil in this case had no effect whatsoever upon the lapsed share intended for Peter Kington, but that it belonged to the heir at law.

But it is submitted, that if a will duly attested, and directing the conversion, refer to any papers made prior to, or at the time of making the will, for a disposition of the fund, there no attestation or signature would be necessary to those papers, for then the will clearly indicates, by reference, the purposes for which such constituted fund is disposable, and no future dominion is reserved over the estate, or interest arising out of the estate; and, consequently, such disposition will not come within the mischief provided against by the statute of frauds.

(*i*) 18 Ves. 156.

*CHAPTER VI. [*128]

ON AN ABSOLUTE CONVERSION OF REAL ESTATE INTO PERSONAL.—EFFECT OF THE STAMP ACT ON REAL ESTATE, DIRECTED BY WILL TO BE CONVERTED.—CLAIMS OF THE REPRESENTATIVES OF PERSONS ENTITLED TO PROPERTY DIRECTED TO BE CONVERTED.

BUT although the produce of lands which is unapplied for the purposes contained in the will passes to the heir at law of the testator, as being that undisposed of interest in land which was in him at the time of his decease, and, therefore, could never be strictly part of his general personal estate, and go as such to his personal representative; yet, still, it is in the power of a testator to decide what shall be the nature of his property after his death, so as to preclude all question between his real and personal representatives;(*a*) and if a disposition has been made of real estate, demonstrative of an intent that it shall change its nature and be made personal, and follow the fate of personal estate, if a testator has definitively stamped his real estate with the character of personalty, *not only for the purposes of his will, but likewise for all intents and purposes whatever*, the heir at law will be excluded, not only from the land, but from every interest in the produce which may arise from a sale of the land, so directed to be converted.(*b*)

*The law gives all real estate not actually disposed of to the heir, and equity, following the law, permits every interest in land undisposed of by the ancestor at the time of his death, to result to the heir, who can, therefore, claim from the trustees or executors that produce of real estate which in the event has been unapplied for the purposes requiring a conversion; yet that equity is not invariably administered, since the evidence afforded by a will, or even by a parol, has been frequently admitted to rebut a resulting trust. [*129]

There is, however, considerable difficulty in ascertaining what shall amount to a sufficient implication in a will converting real estate into personal, so as absolutely to be a conversion out and out, and to deprive the heir of all interest whatsoever in the produce of the real estate, when not expressly given away.

We have before remarked, that the implication arising from the gift of a small part of the produce, though held in the older cases as sufficient to exclude the heir at law, does not obtain in the modern decisions.

In the case of *Hill* v. *Bishop of London*,(*c*) the devise was, "I devise my advowson of *B.*, and all glebe lands, profits, and appurtenances to the same belonging, unto *G. S.*, willing or desiring her to sell and dispose of the same, as soon as she conveniently could, to the Fellows of Eton College, or, on their refusal, to the Fellows of Trinity College, Oxford;" but no actual disposition was made of the money arising from the sale. On the first hearing, Lord Hardwicke considered it as a result-

(*a*) Ashley v. Palmer, 1 Mer. 296. (*b*) M'Cleland v. Shaw, 2 Sch. & Lef. 538.
(*c*) 1 Atk. 618.
(*d*) Cook v. Duckenfield, 2 Atk. 562. Gibbs v. Rumsey, 2 V. & B. 294.

ing trust to the heir at law: on a re-hearing he thought that there were
[*130] two objects of the testator's bounty, *G. S. and the Colleges;
and therefore, the heir was neither entitled to the intermediate avoidance between the death of the testator and the sale of the advowson, nor to the money to arise from the produce: and Lord Hardwicke said, "If *G. S.* devise lands to *A.* to sell them to *B.*, for the particular advantage of *B.*, that advantage is the only purpose to be served according to the intent of the testator, let the money go where it will; yet there is no instance of a resulting trust in such a case."

If, on the sale of real estate under a will, the testator himself has made no disposition of the produce, but has given it upon trust to the trustees or executors to dispose thereof, that circumstance has been sufficient to exclude the heir;(*d*) and so, likewise, if there is no direction to sell, but the testator has given his real estate for the purposes of distribution, with a power to the trustees to select the most deserving of his relations, and to convert or forbear to convert, as should be the most convenient mode of distribution, and the power, on account of the death of the trustee, is not entirely exercised, the Court will distribute the real estate as real, and the personal estate as personal, amongst the testator's next of kin, and the heir can neither claim that which has not been converted, nor that which, having been converted, has not been distributed by the trustees;(*e*) but, at the same time, the objects of the power must not be too vague nor indefinite, as then the produce would result to the heir.(*f*)
[*131] The trustees themselves can never take under such circumstances, *as they take only for the purposes of distribution; which intention is sufficient to exclude them from any benefit:(*g*) if, however, there is an absolute power of disposition given to the trustees and executors of the produce, and it cannot be inferred from the will that they take the produce upon trust, they will be considered to hold it for their own benefit: and the fact of their being created trustees for other purposes of the will, does not necessarily imply that they are likewise trustees of that over which the unlimited power may extend.(*h*)

And it seems, that in order for the simple contract creditors to avail themselves of the surplus of the produce of real estate, there should be clearly a conversion out and out; for although, in the case of *Kidney* v. *Coussmaker*(*i*) the creditors got at the fund by applying the words "after payment of my debts" to the whole fund, considering it as a residue, yet that authority has been much doubted; and it is now necessary that there should be a strong apparent intention to turn the real estate into personal, not merely for the specific purposes, but absolutely, as otherwise the creditors cannot consider it as converted out and out; nor, on the failure of the specific purposes, can they get at the money which was intended to be applied for such purposes, to the exclusion of the heir at law.(*j*)

In the case of *Yates* v. *Compton*,(*k*) *A.* devised that his executors
[*132] should sell his land in Dale, and with the *money arising by
that sale and the surplus of his personal estate, should pur-

(*e*) Walter v. Maunde, 19 Ves. 424. (*f*) Vezey v. Jamson, 1 S. & St. 69.
(*g*) Cook v. Duckenfield. Vezey v. Jamson, ut supra.
(*h*) Gibbs v. Rumsey, 2 V. & B. 294.
(*i*) 12 Ves. 136. (*j*) Gibbs v. Ougier, 12 Ves. 413.
(*k*) 2 P. Wms. 308.

chase an annuity of 100*l.* for the life of *J. S.*, and should allow to her so much thereof as would maintain her and her children; and gave 30*l.* to each child, to be raised out of the said annuity and the personal estate he should die possessed of; and the overplus of his personal estate he gave to *J. S.*, and made *B.* and *C.* executors. *J. S.*, the annuitant, died within three months after the testator; and the plaintiff, who was the administrator of *A.'s* will (the executors having renounced,) filed his bill against the heir of the testator to compel him to join in a sale of the lands in Dale; and it was insisted on the part of the heir, that as the power of sale was only given to the executor for a particular purpose, which having failed, therefore, the lands ought not to be sold but go to the heir at law, (as when lands were devised for raising portions for daughters, who died before they were marriageable, or for the payment of debts, which were liquidated before the testator's death,) yet the Lord Chancellor held, that here the intention of the will was to give all away from the heir, to turn the land into personal estate: that this intention ought to be taken as at the death of the testator, and not to be altered by any subsequent event. He, therefore, decreed the lands to be sold, and the money arising by the sale to be paid as personal estate to the plaintiff, subject to the children's legacies: but, it is added, that it does not appear to be mentioned by the register's book in what right the Court considered the plaintiff to have been entitled.

And where a testator gave all his real and personal estate to trustees, upon trust to pay legacies; and after a particular disposition of 10,000*l.* gave the residue of his property in trust for his next of kin, according *to the Statutes of Distribution, and directed his [*133] executors, who were the trustees, to pay any debts upon any evidence they thought proper, except the claims mentioned in the margin. No claims were found mentioned in the margin after the death of the testator; and the trustees were held liable to pay all debts whatever, upon evidence satisfactory to them, and the residue, after such debts, to the next of kin of the testator. (*l*)

Notwithstanding, therefore, that there is nothing to prevent a testator from devoting his whole real estate to be sold absolutely, so as, in the first instance, to cause it to be considered as personalty, yet the question appears to be untouched as to what particular expression will constitute such a conversion, so that it shall be considered not only a conversion for the purposes of the will, but likewise for all intents and purposes whatsoever.

When, however, it is said, that so general and unlimited a conversion can be effected by will, it must not be understood that a testator will be allowed to apply the produce of his land for a purpose to which the land itself by law is inapplicable. We have seen in many instances mentioned in the preceding chapter, that a testator, even by the most explicit terms, cannot so absolutely convert his real estate into personal as to give the produce of land to a charity. There are many other instances in which similar attempts have been made to defeat the Statute of Mortmain. (*m*) That statute, indeed, does not contain any express words prohibiting a *bequest of money, to be produced by the sale of [*134] lands, for charitable purposes; but it is now settled by con-

(*l*) Mildred v. Robinson, 19 Ves. 585. (*m*) 9 Geo. 2. c. 36.

struction, that such a bequest is within the spirit and meaning of the law;(*n*) nor can any charity, whether in England or elsewhere, not within the exception of the statute, derive any benefit from the produce of real estate directed by will to be converted; and so little are the Courts inclined to favour a testator's intention in this respect by any arrangement of his assets, that where there is a sum of money, together with the produce of real estate (which is void by law,) bequeathed to a charity, the legacy of the money must contribute rateably for the payment of the debts and legacies, which will not be entirely thrown on the unapplied produce of the real estate, in case the fund for the payment of the debts and legacies should prove inadequate.(*o*) And so, also, where a general residue constituted by the produce of real and personal property, is given to a charity, subject to the payment of debts and legacies, although, as before, the charity is by law deprived of so much of the fund as is constituted of real estate, yet the produce of the personalty will, with that of the realty, be applied proportionally for the payment of debts and legacies, leaving to the charity the residue only after this rateable contribution.(*p*) The only instance, indeed, in which it can be maintained that a charity can by devise take any benefit out of land, is the instance of a contract before alluded to in the case of *Middleton* v. *Spicer*.

[*135] When real estate is directed by will to be sold, it is, *under certain circumstances, subject like other personalty to the payment of the legacy-duty.

By the statute of the 48 Geo. III. c. 149, schedule 3, it is enacted, that "for the clear residue (when given to one person,) and for every share of the clear residue (when given to two or more persons,) of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, (after deducting debts, funeral expenses, legacies, and other charges first made payable thereout, if any,) where such residue or share of residue shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 10th day of October, 1808," a duty is payable after the rate there assessed. If, therefore, in a will devising real estates to trustees, upon trust to sell, this direction be not done solely with a view for the payment of debts, but the direction is to sell, in all events, and to be turned into money, and the profits arising from such sale to go in aid of the personal property in discharge of pecuniary legacies, and the residue to go as the remainder of the testator's personal estate; the legacy duty will be payable on this residue, even if the purposes have not called for a sale of it.

In the case of the *Attorney General* v. *Holford*(*q*) *G. B.* devised a freehold estate to trustees upon trust to sell, and that the profits arising therefrom should be deemed part of the residue of his estate therein after

[*136] disposed of, or go in aid, if necessary, of the rest of his *property, in discharge of his pecuniary legacies, either by his will or any codicil thereto. The testator then, after giving various legacies by his will, gave and devised all the residue of his estate and effects whatsoever and wheresoever, unto *J. H.*, his heirs, executors,

(*n*) Curtis v. Hutton, 14 Ves. 537.
(*o*) Howse v. Chapman, 4 Ves. 542.
(*p*) Curtis v. Hutton, ut supra.
(*q*) 1 Price, 246.

and administrators for ever. And it was decided, that as this property would be considered in equity as sold, although it might not be in fact sold, and supposing him to have died before election, it would h ve gone to his personal representatives, this bequest was within the before-mentioned statute, and the duty was payable thereon.

If real estate is directed to be sold and the produce invested in the funds, the interest whereof to be for the benefit of certain persons for life, and afterwards the capital to go to children or others, but which, from circumstances, can only be invested in different sums, at intervals in the course of several years, so that no immediate account of the whole can be rendered, in order to pay the duty on the life-interest; the better course would seem to be, to pay the duty upon the several sums as received and deduct it therefrom previous to investment.

We come now to the consideration of those cases where the person entitled to any beneficial interest in the property to be converted dies after he has a vested interest in the property, but before any actual conversion has taken place, and his different representatives claim this property: but, in order to decide their rights, it is necessary, in the first place, to ascertain in what quality, (whether as realty or personalty,) the interest had vested in such person before his death.

When a conversion is directed by deed for any purposes, and it is not effected during the grantor's lifetime, *we have seen that the surplus, if any, is an interest in land at the death of the grantor, and will pass to his real representative, who may keep the estate unsold by providing for those purposes, and it will, therefore, pass to his real representative. But if the existing purposes require a conversion, the interest that passes will be the produce of land; and though it cannot go to the executor as money, not having been converted during the life of the grantor, but must descend to the heir, yet it will be his personal estate, and, as such, go to his personal representative. (*r*) [*137]

While, therefore, there exists any purpose requiring a conversion, the interest in the property to be converted by deed will be the personal estate of the person entitled and pass to his personal representative: but when no purpose any longer exists, the interest in the property will be the real estate of the person so entitled, and accordingly pass to his heir.

So, also, when under a will directing a conversion, the devisee, or the heir at law, in default of a complete appropriation of the entire interest of the ancestor, is entitled to an interest in land, if the devisee or heir fail, an ulterior question arises, whether this interest which the devisee or the heir would have taken shall go to his real or personal representatives; and, perhaps, nothing can show more completely how much the conversion depends on the purpose requiring it, than the solution of this question; for when it occurs, the true inquiry is, whether, *in the events which have happened*, the devisor has expressed an intention that the land shall be converted into money; for unless the events have happened, or the purposes have occurred, the devisee or *heir will take the land as land, and not in its converted state as money: as, where a devisor directs his land to be sold, and the produce divided between *A.* and *B.*, the obvious purpose of the testator is, that there [*138]

(*r*) Hewit v. Wright, 1 Bro. C. C. 86.

shall be a sale for the convenience of division, and *A.* and *B.* take their several interests as money, and not land. So, if *A.* die in the lifetime of the devisor, and the heir stand in his place, the purpose of the devisor, that there shall be a sale for the convenience of division, still applies to the case, and the heir will take the share of *A.* as *A.* would have taken it as money, and not land. But if it be supposed that *A.* and *B.* both die in the lifetime of the devisor, and the whole interest in the land descends to the heir, the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event so as to give the interest of the heir the quality of money; the obvious purpose of the devisor being that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would, therefore, be entitled to the whole interest as land, and which consequently, on failure of the heir, would descend as realty.

In the case of *Bartholomew* v. *Meredith*,(*s*) *J. S.* by will devised lands to be sold for payment of portions to his younger children: one of the children died after the portion became payable, but before the land was sold; and this interest in land was accordingly held to go to the administrator of the deceased child.

[*139] In the case of *Doughty* v. *Bull*,(*t*) lands were devised to *be sold for the purpose of a division amongst the children, the eldest of whom having attained his age of twenty-one and married, died, leaving a widow; and it was held that the eldest son's share was personalty in him, and that his widow would be entitled to a moiety of the produce of his share of the lands when sold.

And again, where a testator,(*v*) blending his real and personal estates, devised them to trustees, and directed, that as well the money arising by the sale of his real estate as of his personal estate, should from time to time be invested in government or real securities, in trust to pay the dividends and interest to *S. S.* for life, and after his death to pay the principal amongst his children; but, in case *S. S.* should die without children, to assign the principal of such funds and securities unto *W. S.*, *J. S.*, and *C. S.*, in equal proportions, and to their issue, with benefit of survivorship. *C. S.* died having never been married; then *S. S.* died without issue; and seven years afterwards *J. S.* died, leaving a widow and five children. The eldest son of *J. S.* claimed to be entitled, as his father's heir at law, to his father's share of so much of the testator's estate as was constituted of realty; but, as the purposes of division between *W. S.* and *J. S.* still required a conversion, the Master of the Rolls said, that it was personal estate in *J. S.*, and the claim of the heir at law was consequently excluded. In this case, however, there was a power for investing the money arising from the sale of the testator's real and personal estate in land, which circumstance might have been an additional reason for inducing the Court to treat the testator's property as personalty.

*In a subsequent case,(*w*) a testator, *S. W.*, having devised his real estate to trustees for payment of debts, bequeathed the residue of his property, of what nature or kind soever, to trustees, upon trust to pay

(*s*) 1 Vern. 176.
(*t*) 2 P. Wms. 230.
(*v*) Maberly v. Strode, 3 Ves. 450.
(*w*) Wright v. Wright, 16 Ves. 188.

an annuity to his widow, and the remainder beyond the annuity to be carried on for the benefit of his daughter, [*140] upon her attaining her age of twenty-one or marriage; but in the event of his daughter dying unmarried, and without having attained her age of twenty-one, the testator bequeathed not only the remainder above the annuity, but also the capital from which the annuity was raised, in such manner as he should direct by a codicil. No codicil was ever made; the daughter died under twenty-one, unmarried and intestate, in the lifetime of the widow, who claimed the testator's property as personalty, one-half in her own right and the other half as the administratrix of her daughter, against the son of the testator's elder brother who claimed the testator's real estate as his heir. But the Master of the Rolls, without raising the question whether in this case the conversion was absolute or qualified, said, that in the events which had happened, the result, with respect to the rights of the parties, would be the same; for in the one way the mother and daughter would take it as personal property, distributable as upon an intestacy, with respect to the capital; and the mother, as administratrix to her daughter, would be entitled to her share: in the other way, the daughter would, as heir at law, take it by way of resulting trust upon a failure of the object for which the conversion was made; but it would be personalty in her, and the mother, as her administratrix, would in that way also be entitled to [*141] the whole.

And where(x) *J. F.*, by his will, devised his burgage-houses, and free rents in Kendal, and all his personal estate, to trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, and, after her decease, to sell and dispose thereof, and to pay the money arising thereby (after deducting certain charges) between his son William and daughter Mary, share and share alike; and it was added, that in case either his son William or his daughter Mary should die before his or their legacy should become due, the share or legacy of him or her so dying should go to the survivor of them. The testator died, leaving Agnes his widow, William his only son and heir at law, and Mary his daughter. Agnes, by the custom of burgage tenure, was entitled to hold the burgage-houses in Kendal during her widowhood, against the disposition of her husband by will. Mary attained twenty-one, but died unmarried in the life of her mother and brother. William was twenty-one at the death of the testator, and died without issue in the lifetime of his mother; and upon the death of the testator's widow a bill was filed by the heir at law of William, and John, the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will, to the plaintiff, the heir at law. The representative of the widow, who was the sole next of kin of William the son, by answer claimed the property as personal, [*142] alleging, that by the direction to the trustees to sell the real estates they became as personal property, and, as such, were to go to the personal representative of William, the son, who survived his sister: and as it was necessary that the estate should be sold for the purposes of pay-

(x) Fletcher v. Ashburner, 1 Bro. C. C. 497.

ing off the charges, William's interest vested in him as money, subject to his mother's interest for life or widowhood; and, as she was his sole next of kin, her personal representatives were held by the Court to be entitled to the estate as money.

The case of *Smith* v. *Claxton*(*y*) is an example of both instances of the rule before stated; viz. that if the purposes requiring a conversion exist, the interest in the real estate to be converted will pass to the personal representatives; and that if they no longer exist the interest will pass to the heir at law of the person who would have taken this interest had he survived. In that case, a testator, having three sons, *A.*, *B.*, and *C.*, had given certain estates in aid of his personalty for payment of debts and legacies, and the residue to his wife. He had also given certain other estates to his wife for life, with remainder to his son *B.* for life, with remainder to trustees to sell and dispose of the profits amongst the children of his son *B.*; and, in default of children, the money arising by the sale was to be divided between the testator's two other sons, *A.* and *C.*, in equal shares; and the testator gave other estates to his eldest son *A.* for life, and on his death to sell the same and divide the produce amongst the children of *A.*; and if there should be no children of *A.*, then in trust for the testator's sons, *B.* and *C.*, in equal shares. The wife died *in the testator's lifetime, and so also did his eldest son *A.* without leaving issue; whereupon *B.* became the testator's eldest son and heir at law, who dying without issue, and without having made a will attested to pass real estates, the question between *B.'s* representatives was, what interest the son *B.*, as heir at law of the testator, took on the death of the ancestor. Now, by the death of the wife in the testator's lifetime, as the personalty was sufficient for the payment of the debts and legacies, the interest under the first part of the devise became lapsed and descended to *B.*, the heir at law of the testator; but as the purpose for which the conversion was directed, viz. the payment of debts and legacies, no longer existed, the interest under this part of the devise vested in *B.*, the testator's heir at law, as land, and not as money. Under the second part of the devise, as on the death of *B.'s* sons, and of *A.*, in the testator's lifetime, the interest became divisible between *B.*, the testator's heir at law, and *C.*, the purposes requiring a conversion for the convenience of division still existed; and, therefore, this interest vested in *B.* as personal, and not as real estate. So, likewise, under the third part of the devise, the purposes requiring a conversion still existing, the interest thereby devised for the same reasons vested in *B.* as personal, not as real estate; and, consequently, *B.'s* heir at law succeeded to the interest to which *B.* was entitled under the first part of the devise, and his personal representative to that interest to which he was entitled under the second and third parts of the devise.

[*143]

If, then, the purpose exists for which the property has been directed to be converted by the will, it must go to the personal representative of the devisee. If the purpose no longer exists, the property will be as it *was in the hands of the testator, and, therefore, pass according to its true nature.

[*144]

Nor is the principle varied when the benefit of a term was held to be that interest in land, which, being undisposed of by the will of a testator,

(*y*) 4 Madd. 484.

who thereby created it, would result to his heir at law; but, having resulted, would descend as his personal estate. As, where *W. C.*, by will, devises to trustees and their heirs, his lands in *S.* upon trust, that they shall receive the rents and profits until his son William attain his age of twenty-one, and pay a third part thereof to his wife Anne in lieu of dower, and out of the other two-thirds raise portions for his daughters, and devises all to his son William, when twenty-one, in tail; and, for want of such issue, distributes the estate therein mentioned. The son died, and the widow died before her son would have attained his age of twenty-one years, if he had lived; and as the bequest as to her was determined, it became a question who should have that third part of the profit until the son would have been twenty-one, since the inheritance was not disposed of by the will until such time as the son would have been twenty-one: and it was resolved, that the executor of the testator, as executor, had no right to this term, for that it was not a term absolutely raised and taken out of the inheritance, but rather a direction to the trustees, who have the whole fee in them, how they should dispose of the profits until his son attain twenty-one: but in case it had been a term absolutely raised out of the inheritance, yet being raised for a particular purpose, which was satisfied, the heir should have the benefit of the surplus of the term: and though the heir was favoured thus to have the surplus of a term so carved out of the inheritance for a particular purpose, yet he must have it as a term which must go in a course of administration, and *not in a course of descent; and it was, therefore, decreed for the administrator of the heir, and not to his heir.(*z*) [*145]

Nor is the case of *Ashby* v. *Palmer*(*a*) repugnant to this rule; for although the purposes never required a conversion of the real estate, as the testator's debts and funeral expenses were defrayed out of his personal property, yet, under the peculiar circumstances, it was rightly held to pass to the personal representative of the first taker. By the will the devisee took the estate, absolutely impressed with the character of personalty, and becoming a lunatic before her age of twenty-one, it so remained until her death. She was unable to take the estate in a different character from that in which she had received it; and it, therefore, passed to her personal representative: it was rather a case of election than of resulting trust; the facts of the case were these: *E. F.* devised and bequeathed to trustees all her real and personal estate, in trust, to sell as soon as convenient after her decease, and out of the money thereby raised, and with the rents, issues, and profits of the real estate, until sale, in the first place, to pay and discharge all her debts and funeral expenses, and with the surplus to bring up, maintain, and educate her daughter Elizabeth, in such manner as they should think most for her advantage, until twenty-one, or marriage; but if she should die unmarried under twenty-one, then, and in such case, all such money as should remain in the hands of the trustees, and such part of the real estates as should remain unsold, (if any) at the time of her decease, and not applied in payment of her debts, or in the education of her *daughter, should be for the benefit of her sister, *M. P.*, her heirs, executors, and assigns. The testatrix died in the year 1760, leaving her [*146]

(*z*) Levet v. Needham, 2 Vern. 138. (*a*) 1 Mer. 296.

daughter an infant. The trustees entered upon the real estate, and possessed themselves of the personal, and thereout paid the debts and funeral expenses. The daughter of the testatrix afterwards attained her age of twenty-one, having previously become a lunatic, in which state she continued till her death, and died in 1803, unmarried and intestate. No part of the real estates was sold under the trusts of the will; and after the death of the lunatic, her heir at law entered into possession. The bill, filed by the next of kin of the lunatic, charged that the real estate was converted by will into personal, and prayed a sale and distribution. And it was decided that as by the will the land was given by the testatrix to her daughter only as money, therefore the intestate, *E. F.*, took the real estate of the testatrix as personal property, and it would, as such, pass to her personal representative, as she was incompetent, from her state of mind, to take from the real estate the character it had received under the will.

[*147]

*CHAPTER VII.

ON THE CONSEQUENCES OF A CONVERSION BY PERSONS ENTITLED IN AUTER DROIT, AS THE ASSIGNEES OF BANKRUPT'S ESTATE, GUARDIANS OF INFANTS, COMMITTEES OF LUNATIC'S ESTATE, &c.

We propose now to draw the reader's attention to the consequences of a conversion of property, when effected by persons entitled in *auter droit*, and which could not conveniently have been introduced in the preceding chapters, on account of the difference of principle on which, in many instances, this branch of our subject relies.

It frequently happens, that persons who are entitled in *auter droit*, such as the assignees of a bankrupt's estate, the guardians of infants, or the committees of the estates of lunatics, being invested with certain powers for the management of the property of their cestuisque trust, (the origin and general extent of which it is not within the limits of the present treatise to examine,) in the exercise of their authority, change the nature of more property than is actually requisite: a question then occurs between the real and personal representative of those on whose behalf they act, whether the nature of the property is to be considered as changed, which it is in fact, or not; and as the principles by which the conduct of such trustees with regard to the conversion of property materially differ, we shall in the present chapter discuss them separately.

[*148] *Although it is enacted,(*a*) that a bankrupt's commissioners shall not only make a true declaration to the bankrupt of the employing and bestowing of his lands, tenements, and hereditaments, &c., which shall be paid and satisfied to his creditors, but shall also make payment of the overplus of the same, if any such shall be, to the bankrupt, his *executors, administrators, and assigns;* yet it has always

(*a*) 1 Jac. 1. c. 15, s. 15.

been held that the bankrupt laws had no purpose to alter the character of surplus property between the real and personal representatives of a bankrupt, as there could be no difference in principle, whether a charge for the payment of the bankrupt's debts be made by the provision of the law, or by that of the party himself. Accordingly, it has been decided, that if the real estate of the bankrupt has not been sold before his death, and the creditors have been fully satisfied, it will go to the heir at law of the bankrupt, and if, after his death, it is necessary that any part of the real estate should be sold, whether under a decree of the Court,(*b*) or by the assignees themselves,(*c*) the surplus of the money arising from such sale has been decreed to be paid to the bankrupt's heir.

The bankrupt's real estate, which is unsold and uncontracted for at the death of the bankrupt, is considered as descending to his heir, subject to the charge created by the provisions of the bankrupt laws for the payment of his debts; which laws not being made to vary the rights of parties, leave unaffected the surplus produce arising from such sale after the purposes are satisfied, and which will therefore belong to the heir at law; but if the conversion is effected during the bankrupt's life, *the unapplied produce will in that case descend as his personal property.(*d*) [*149]

So far the general principle laid down in the two preceding chapters relative to the claims of the different representatives is strictly adhered to:—the ancestor's interest in land descends on his death to his heir at law, the bankrupt laws only creating a charge to the amount of the debts of the bankrupt. But the law relative to the conversion of property by the guardians or trustees of infants, admits of some variation from the doctrine previously mentioned.

It is a principle of courts of equity, that a due administration of an infant's property requires that the nature of it should not be changed as between his representatives; and the Court will not suffer his real estate to be changed into personal, nor his personal estate into real, in order that the persons who are to come into succession may find the property in the same state, without being altered by those who had not power to alter it.(*e*) Such an act would indeed be a great injustice; for as the infant might dispose of his personal estate at a much earlier period than he could of his real, it cannot be allowed that the trustees, at their pleasure, by converting his personal estate into real, should debar the infant of that right and privilege which is given him by law, and advance the heir at the expense of the infant's next of kin, or in case of a will of his legatee;(*f*) therefore lands purchased by the guardian of an infant with his personal estate, will, in case of his death during minority, be considered still as his personal property:(*g*) *and so likewise where the trustees of an infant's estate having a considerable sum of money in their hands, which they had raised out of his real estate, invested it in lands lying advantageous to the estate, with the guardian's consent, and by the conveyance to the trustees it was declared, that they stood seised in trust for the infant, in case when he came of age he should accept the lands at the rate they had bought them, and discharge them [*150]

(*b*) Bromley v. Goodere, 1 Atk. 75.
(*c*) Banks v. Scott, 5 Madd. 493.
(*d*) Banks v. Scott, 5 Madd. 493.
(*e*) Rook v. Worth, 1 Ves. sen. 460.
(*f*) Earl of Winchelsea v. Norcliffe, 1 Vern. 434.
(*g*) Gibson v. Scudamore, 1 Dick. 45.

of the sum so laid out: the infant dying under age, the trustees were held to be accountable to the administrator of the infant for the sum laid out, and his heir was declared to have no title to the lands.(*h*)

It has been said, that the proper mode which trustees should adopt, when authorized to purchase real estate, by means of the personal property of an infant, is to procure the conveyance to be made to the trustee, in trust for the infant, his executors, and administrators, until he should attain the age of 21, and from and immediately after that period in trust for the infant, and his heirs.(*i*) It is, however, far more preferable to procure the conveyance to be made to the trustee, with a declaration generally, that it shall be considered as personal estate, without saying, until the infant should attain 21, for at that period the infant might be under disabilities as to the management of his propery, and if he is not, he may then, if he pleases, consider it as real estate. By a conveyance so qualified, it is evident no injustice can be committed to the infant or his representative; and the *Court has approved of this [*151] method;(*k*) and the necessity of it may be appreciated by contemplating the case of *Ashby* v. *Palmer*.(*l*) But if the trustees omit this declaration as to the nature of the real estate, yet neither the infant nor his representative will suffer by such an omission; for if there was not a declaration by the trustees, that such rights should not be altered in the event of the infant dying under age, a court of equity would imply it;(*m*) and although it is said, that if the trustees come into Chancery, and obtain a decree for the investing an infant's money in a purchase, the Court will maintain its own decree,(*n*) and when it is manifestly beneficial, will, either by a decree or an order, not only change the nature of the infant's property, but will support the conduct of guardians and trustees, if under circumstances of which the Court can approve and consider for the benefit of the infant;(*o*) yet as the Court expressly disowns the right to change the nature of the property,(*p*) when this language is used it must not be construed to extend to such an alteration in the property as would affect the rights of his representatives. For, as Lord Eldon says, "I have uniformly made it a rule, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he will have a disposable power, the representative shall not be preju- diced in any degree by *the act done by the Court in con- [*152] templation of the infant's benefit, in all the circumstances which surprise or accident can throw around it. It is said this is the effect of the Court's declaration; and if the Court forgets to make that declaration, that the same rule does not obtain, and the Court has disposed of the property by an imperfect judgment, in another manner, and subject to different equities. But that is not correct; for the declaration is made because it is the law applicable to the case of the infant, and it is of course to reform the order. The Court only determines that the guardian or

(*h*) Earl of Winchelsea v. Norcliffe, 1 Vern. 434.
(*i*) Ashburton v. Ashburton, 6 Ves. 6.
(*k*) Webb v. Lord Shaftesbury, 6 Madd. 100.
(*l*) 1 Mer. 296, et vid. supra, p. 145.
(*m*) Witter v. Witter, 3 P. Wms. 99.
(*n*) Earl of Winchelsea v. Norcliffe, 1 Vern. 434.
(*o*) Inwood v. Twine, Ambl. 417. (*p*) Ibid.

trustee ought not to omit this declaration, and, consequently, if they do omit it, they act unduly by the infant."(*q*)

If, therefore, the Court, or the guardian, does not, at the time of the conversion, make a declaration respecting the rights of the infant's representatives, in case he never attains an age to dispose of his real estate, the personal representative will not be affected by such an omission, but will be entitled to such a respective quantum of interest in the real estate as would be equivalent to the infant's personal property before the conversion. But if the guardian has an absolute authority to deal with the property as he shall think most conducive to the infant's interest, under such circumstances he has been allowed to alter unqualifiedly the nature of the infant's property;(*r*) and the Court will also allow the trustee to deviate from the letter, if he still conform to the spirit of the trust: as where *W. D.*, by his will, directed his trustees to lay out a sum of money in the *purchase of freehold land only, upon a petition of the trustees, suggesting that they could not, without great dis- [*153] advantage, purchase the freehold of an estate, unless they took along with it a college-lease, the Court dispensed with the strict directions of the will, and approved of the purchase of the lease at the same time with the freehold;(*s*) and therefore it would seem that, if it was desirable, the trustees could lay out part of the trust-money upon actual improvements on the freehold itself: but if personal property be changed by the guardian into real estate, and the rents are received by the cestuique trust when an adult, it will be accounted such an acquiescence in the act of his guardian as to leave it no longer disputable.(*t*)

Hitherto we have spoken only of the application of the infant's personal property to the actual purchase of real estate; but it frequently happens that guardians or trustees, thinking it desirable to relieve the infant's estate from charges and incumbrances, apply his personal property to those purposes; and as such charges and incumbrances are certainly an interest in the lands on which they are secured, this application of the infant's personalty is to all intents such a conversion of his property as effectually to alter its nature. The law regarding the application by the guardian of the personal property of infants, who are tenants in fee of the estates on which the charges and incumbrances are secured, in many respects materially differs from that by which the conduct of guardians should be regulated, when the infants have only an estate-tail; for if there is a charge *on real estate, which estate itself comes to the person entitled to the money, if the estate is in fee the [*154] charge will merge,(*u*) unless there is evidence of the owner's intention to the contrary; as where there was a term of 500 years in trustees to secure a daughter's portion, payable at eighteen, or marriage, the fee descended to the daughter, who afterwards died unmarried, and an infant of the age of eighteen, having first made a nuncupative will, and thereby devised all in her power to her mother; whereupon it was decreed by Lord Somers, and affirmed by the House of Lords, that this portion was not merged, but should go to her mother, who had administration with the will annexed.(*v*)

(*q*) Ware v. Polhill, 11 Ves. 257.
(*r*) Terry v. Terry, Cha. Prec. 273.
(*s*) Gosselin v. Dodwell, cited 3 Atk. 414.
(*t*) Inwood v. Twine, Amb. 417.
(*u*) Duke of Chandos v. Talbot, 2 P. Wms. 601.
(*v*) Thomas v. Kemeys, 2 Vern. 348. 1 Eq. Abr. 268, and Freem. 207.

And if there is any incumbrance on the estate in fee of an infant, to which a third person is entitled, the guardian may discharge it by means of the infant's personal estate, as that could work no injustice to the infant nor to his representative; for had the money come to the hands of the executor it would have been liable to the debt due by mortgage, and the heir could have compelled him to have paid off the incumbrance.(*w*)

But where the infant is tenant in tail of an estate charged with an incumbrance, the relieving of such an estate by the guardian would be in fact a gift of so much money to the remainder-man at the expense of the infant's personal representative, and, consequently, a breach of trust on the part of the guardian. The distinction between the case of an infant tenant in fee, and that of an infant tenant in tail, has always been acknowledged;(*x*) *and as it is impossible for the infant tenant in tail to alienate or charge the estate, his situation has often been compared to that of a tenant for life. Now it has been said to be the wisdom of the administration of justice, in order to introduce some degree of certainty, to lay down the rule that the act of the tenant for life in paying off a charge upon an estate shall *primâ facie* be intended to make him a creditor, and the ground of inference is the scantiness of his estate. He cannot be intended to discharge it, because it would be discharging the estate of another person;(*y*) and if the situation of an infant tenant in tail is similar to that of a tenant for life, it would be impossible for those in remainder who succeed to the estate on the death of an infant tenant in tail to say, that they would hold it without permitting an incumbrance in some shape to do justice to the infant's personal property; and, consequently, if the estate of an infant tenant in tail is charged with debts which are defrayed by means of his personalty, on the death of the infant under age, his executor will have a claim on the estate to the amount of the sum paid out of the infant's property; but the infant tenant in tail must keep down the interest of any incumbrance, although the adult need not, because equity considers, but perhaps not accurately so, that the adult is owner of the estate, and the remainder-man at his mercy, and he therefore has no equity against the adult.(*z*)

[*155]

[*156] *Where a copyhold estate entailed, consisting of a house and premises of the value of 148*l.*, having been burnt down, the sum of 96*l.* was collected on briefs towards the rebuilding, and paid by the trustees of the charity into the hands of the guardian of the infant tenant in tail, who died under age, without its having been so applied, it was held to have been gross neglect in the guardian not to see the money laid out in the rebuilding of the premises, since upon a bill in the infant's life, by his *prochein amy* in his name, the Court would have compelled the guardian or trustee to have laid out this money in rebuilding the house; and would not have said, that the money shall be kept till he dies, and then it shall be mere money, and the premises shall be taken without the application of the proper fund to put them in the condition they were formerly; and,

(*w*) Dennis v. Badd, 1 Cha. Ca. 156, and 1 Eq. Abr. 261.

(*x*) Duke of Chandos v. Talbot, 2 P. Wms. 601. Chester v. Willes, Ambl. 246.

(*y*) Countess of Shrewsbury v. Earl of Shrewsbury, 3 Bro. C. C. 120, and 1 Ves. jun. 234.

(*z*) Jones v. Morgan, Bro. C. C. 206. Ware v. Polhill, 11 Ves. 257. Burgess v. Mawbey, Turn. 167. Bertie v. Earl of Abingdon, 3 Mer. 560.

therefore, in the question between the personal representative of the infant and the issue in tail it was decided, that, as the whole personal loss to the infant during his minority was the loss of the profits of the estate, which was considered as the loss of the interest of the sum of 148*l.*, the personal representative could only be entitled to deduct that interest out of the 96*l.*(*a*)

Before we leave this part of our subject, it might not be improper to add a few words respecting the purchase of the land-tax by the guardians of infants.

When the guardians of infants tenants in fee are desirous of redeeming the land-tax on their ward's estates, the act(*b*) enables them to do so by a sale of a part of the *infant's real estate, or by mortgage, or by granting rent-charges,(*c*) &c.; therefore that which was real estate will still remain so; which course is analogous to that permitted by courts of equity in preserving the nature of the infant's property. Under the act just alluded to the infant's personal estate cannot be applied unless by resort to the Court, and then in the application of the personal estate of the infant to the redemption of the land-tax, the Court will take care not to authorize the guardian to contract for the land-tax without directing him to make such an option as would preserve for the infant's personal representative the benefit of the money, if he died under age; and unless such an option could be made, so strongly is a court of equity bound by its own rules in not altering the nature of the infant's property, that the trustees will not be permitted under such circumstances to complete the purchase.(*d*) [*157]

But if persons take upon themselves the care of an infant's property, in such a manner as not to be legal guardians, but guardians only constructively so in equity, and deal with his property in the redemption of the land-tax, by means of his personalty, though they are not such guardians as are contemplated by the act,(*e*) yet, upon the principles by which a court of equity is regulated with regard to the management o. an infant's property, neither would the infant be deprived of his disposition of it, nor his personal representative be left without a claim upon the estate so relieved, as it would be impossible that the successor to the estate should be at liberty to say, that he would *take the benefit of such misapplication, but taking that benefit, he would not permit the infant to have it set right, or compel the guardian to be bound by the transaction for his own benefit; and although under such circumstances a court of equity cannot secure the claim according to the mode prescribed by the act, for the guardians are but so in the contemplation of equity, and therefore the transaction with the commissioners not according to the act, still a charge will be allowed on the estate, as nearly as possible, in the same mode as it might be made under the act; as where an estate was devised to *A.* for life, remainder to his first and other sons in tail-male, remainder to *B.* for life, remainder to his first and other sons in tail-male with divers remainders over; *A.* died under age, leaving an infant son, the executors assuming to act as the guardians of the infant son, laid out some of the infant's personal property in the redemption of the land-tax; the infant died under [*158]

(*a*) Rook v. Worth, 1 Ves. sen. 460.
(*b*) 38 G. 3. c. 60.
(*c*) Vid. s. 20.
(*d*) Ware v. Polhill, 11 Ves. 257.
(*e*) 38 G. 3. c. 60, s. 20.

age and without issue, and his mother, who was his administratrix, filed a bill against *B.*, and his eldest son, and the trustees of the infant, to have an account taken of the sums expended in the redemption of the land-tax, and to be declared entitled to a perpetual rent-charge upon the devised estates, on which the land-tax had been redeemed, to the amount of such land-tax, to be paid from the death of the infant. And although the Chancellor could not give the land-tax or an annuity secured as the act intends, yet the equity administered was by charging the lands with an annuity such as the infant would have had, if an option had been reserved to him, and such charge secured by the grant of his successor, *B.* the tenant for life in possession, holding and enjoying also against the tenant in tail until of age, and then requiring him to make a *grant, and the charge to be always redeemable, as it would have been, if the transaction had been strictly under the act. (*f*)

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Lastly, we may add, that where there has been a conversion of property by means of a stranger, in whom no confidence is reposed, such as by a tortious felling of timber, equity will leave the rights as the representatives find them, that is in their legal state, and will not interpose between them, as they have no ground to claim any such interference. (*g*)

But the principle which governs the administration of the committee of a lunatic's estate in the conversion of his property is very different from that which has been laid down with regard to an infant's property; for although any alteration in the nature of a lunatic's property is as far as possible to be avoided, consistently with the idea of preserving the interest of the proprietor, yet when an alteration of property is necessary, the general object of the attention of the committee is solely and entirely the interest of the lunatic himself; and with regard to the management of the estate, solely and entirely the interest of the owner, without looking to the interests of those who upon his death may have eventual rights of succession; and nothing could be more dangerous or mischievous than for him to consider how it would affect the successors: there would always be among them an emulation of each other; and their speculations, if the administrator was to engage in them, would mislead his attention, and withdraw his observation from the interest of the only person he is bound to take care of: the next of kin would contend for a *short allowance, the heir would have no interest to contend for a small allowance out of the rents and profits, but might yet have some other causes of emulation against the next of kin; and if the interests of the succession were to be respected by the Court, there would be a continued running account between the personal and real estate. If the Chancellor were constantly weighing the probable interests of the representatives, the interest of the lunatic might be sacrificed for the benefit of those who have no immediate interest, and whose contingent interests are left to the ordinary course of events; consequently the Court has always shut out of its view all consideration of eventual interests, and will only consider the immediate interest of the person under its care, making every advantage fairly to increase and improve it, without engaging in risks and dangerous adventures, for those are not fit enterprises; but whatever tends towards ordinary improvement it is strictly the duty of the administrator to do, considering only the im-

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(*f*) Ware v. Polhill, 11 Ves. 257. (*g*) Per Lord Thurlow, 1 Ves. jun. 462.

mediate interests of the proprietor of the estate :(*h*) when, therefore, upon the death of a lunatic a question occurs between his real and personal representatives as to the nature of the property converted by the committee of the estate, there cannot exist any equity in the parties to alter their legal rights, and the property will consequently retain that character which the committee may have given it. In such cases the principle of equity applies, *fieri non debet sed factum valet ;* and although there is an instance(*i*) in which the order of the Chancellor was interposed, where timber was cut down for repairs without proper authority to *have (in taking the account) the surplus, which was in fact [*161] personal, made applicable to the real representative, yet it appears that very little reliance is due to that order, for it is quite inconsistent with the order made a short time afterwards in the very same case, and it was supposed that the surplus, after the repairs, was so trifling that the parties did not think it worth while to rehear it;(*k*) such an act was considered as not unlike that of a bailiff, who had cut timber without authority, but which had not been sold before the owner's death, yet the real representative had no claim against the personal representative, whatever he might have against the bailiff for his conduct.

The committee of the real estate may, under an order exercise the same power over it in regard to cutting timber for repairs as any discreet owner might do;(*l*) for although the statute for the provision of lunatics(*m*) says, that their lands and tenements shall be kept without waste, and that the residue beyond their maintenance shall be kept to their use, to be delivered to them when of right mind, so as that such lands, &c., shall in no wise be aliened; yet upon the principles and reasons of natural justice, a court of equity may for the convenience of those who are not *sui juris*, convert their real estate into personal by sale of timber, &c., or by such act as may be deemed most advantageous, as the word waste is construed differently from its general acceptation, and must be taken in the statute to mean destruction, and therefore does not hinder the committee from making use of those opportunities *which the property of [*162] the lunatic would enable him, if of sound understanding, to make use of; there will, however, be no equity for the heir as against the personal representative to have the surplus of the real estate, which was altered by the Court, restored after the death of the lunatic. As where a sum of money was produced by the sale of timber felled upon the estate of a lunatic, under an order of Court founded upon the Master's report, that it would be advantageous for the lunatic's estate, the heir had no claim to the surplus produce above the purposes for which the timber was felled, there was no equity between the real and personal representatives, since both claimed as volunteers, and the legal right ought, therefore, to decide to whom the property will belong.(*n*)

There is, however, an act(*o*) under which the Chancellor may order the estate of the lunatic to be sold for the payment of debts, and discharging incumbrances, when it shall be thought for the benefit and advantage of the lunatic; but it does not subject the estate to any other debts than

(*h*) Oxenden v. Lord Compton, 2 Ves. jun. 69.
(*i*) Ex parte Grimstone, Ambl. 706.
(*k*) Oxenden v. Compton, 2 Ves. jun. 74.
(*l*) Ex parte Ludlow, 2 Atk. 407.
(*m*) De Prærog. Regis. 17 Edw. II. c. 9 & 10.
(*n*) Oxenden v. Lord Compton, 2 Ves. jun. 69.
(*o*) 43 Geo. III. c. 75.

it is chargeable with by law; and if, after the payment of the debts, there remains any surplus, it provides that it shall be applied and disposed of in the same manner as the estate would have been applied, if the act had not been made. But whenever personal estate is laid out in improvements on the real, it is necessary that the committee first obtain an order of the Court;(*p*) for if they do not, although the Master should consider the improvements necessary, yet they will still be held accountable for
[*163] the expenditure;(*q*) *and it has been said, that the approbation of the next of kin must likewise be obtained.(*r*)

But the Court will apply the personal estate in payment of the debts to any extent, and will take every advantage that tends fairly towards ordinary improvement, considering only the immediate interest of the proprietor; beyond which, any alteration of property, as estates bought, or interests to be disposed of, is, as far as possible, to be avoided;(*s*) nor is the committee authorized to purchase real estate with savings, and so alter the nature of property, for land so purchased will be considered as personalty.(*t*)

Where, however, a committee is intrusted with the care of an estate, and has abused that trust with a view of changing the quality of the estate to serve his own interest, there arises an equity to undo the tortious act. As where the committee of the estate of one Ludlow,(*u*) a lunatic, who were themselves entitled to the real property upon his death, purchased timber for repairs, notwithstanding there was sufficient timber on the estate proper to be cut. Lord Hardwicke observed, committees might exercise the same power over the property with respect to repairs as any discreet owner; but in the present instance they appeared to have acted merely with a view to their own interest, and he therefore ordered them to make good the amount to the personal estate: but there does not
[*164] appear to be *any rule of equity to recall property upon a less ground than this.(*v*)

Here it may, perhaps, be proper for us to observe, that when the real and personal representatives of any one claim the surplus which arises from a sale made under a decree of a court of equity, in a cause in which the person through whom both claim is a party, no relief will then lie to have this surplus produce above the purposes for which the sale was directed, considered as of a nature different from that which it actually is; for a decree of the Court cannot, in such case, be considered as improperly made, no fraud can be supposed, nor any ground to justify the interference of equity, and therefore the parties will be left to their legal rights, to take the property in the state it is in fact. As where(*w*) Sarah Wooley, by will, (dated 28th March, 1749,) gave and devised all her real and personal estate to Francis Plumtree, in trust, in the first place, out of her personal estate as far as it would extend, and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and, after payment thereof, in trust to convey the residue of the real estate, which should

(*p*) Ex parte Hilbert, 11 Ves. 397.
(*q*) Anonymous, 10 Ves. 104. (*r*) Sergeson v. Sealy, 2 Atk. 412.
(*s*) Oxenden v. Lord Compton, 2 Ves. jun. 69.
(*t*) Awdley v. Awdley, 2 Vern. 192, S. C. 1 Dick. 16.
(*u*) Ex parte Ludlow, 2 Atk. 407. (*v*) Ex parte Bromfield, 1 Ves. jun. 453.
(*w*) Flanagan v. Flanagan, cited 1 Bro. C. C. 500.

remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father, James Flanagan, and her brother, James Flanagan, their heirs, executors, and administrators equally. A bill was brought by the creditors for sale of the real estate to supply the deficiency of the personal estate for payment of debts; and a decree was made for a sale; and if *any of the money to arise by the sale should remain after payment of [*165] the debts and legacies, it was directed to be paid to James Flanagan, the father, and James Flanagan, the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs, equally. After the decree James Flanagan, the son, died, leaving a daughter, and a son born after his death. Part of the estate was sold, and afterwards James Flanagan, the grandfather, died, leaving his grandson his heir, and his grandson and grand-daughter, his sole next of kin. After the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies. It appeared, however, that the produce of the first sale was sufficient. A bill was then brought by the son of James Flanagan, the son, claiming a moiety of the surplus, as the real estate of James Flanagan, his grandfather, to whom he was become heir, against the personal representative of his grandfather, the daughter of James Flanagan, the son, who claimed as one of the next of kin of her grandfather; it being thereby objected, that the second sale, after the death of the grandfather, was improper. The Court, however, determined that the second sale, actually made under the decree of the Court before the Master, could not be considered as improperly made; that there was no fraud, and that the money ought to go to the personal representative of the grandfather. Here the Court thought there was no equity between the representatives; that which was done under the order turned out to be clearly wrong; so much of the estate only was to be sold as would pay the *debts, but they sold the bulk for convenience of sale; and there was a surplus, which, if the order [*166] had been strictly pursued, would never have been money, but real estate. It happened that, by the order not being followed distinctly, or guarded sufficiently in the execution, that which would have been land was in fact money. Lord Camden, however, thought nothing arose upon that, but that the parties ought to take their respective rights as they found them.

We cannot conclude this chapter without adverting to a principle, derivable from some of the last-mentioned authorities, and which we find laid down in the books as the grounds of some of the decisions, but which does not seem to admit of a general application in the conversion of property.

It has been observed, that when, by the conversion of property, either by the committee of the estate of a lunatic, or under a decree of a court of equity, a surplus has been produced above the requisite purposes of the conversion, no equity remains for the representatives to claim this surplus in a shape different from what it was in fact. Under such circumstances, the Court is in the habit of saying, that the legal nature of the property must determine to whom it will belong; for the Court by which the property has virtually been converted cannot be considered to have acted improperly: but this principle has been sometimes approved of as

the grounds of decision when the property has been converted under the direction of the actual owners thereof; for in an instance of a conversion of personal estate into real, it being remarked that the limitation to the heirs gave a real quality to the money, and that it so remained until by some act of intention its real qualities *had been removed,(x) Lord Rosslyn answered, "that although such an idea was commonly entertained, yet I do not recollect any case where the heir has said the money ought to be laid out, all the particular objects being gone, and that he as heir claimed the money as land for his own benefit. I doubt what gives the heir a title to subpœna in Court, as between the heir and personal representative their rights are pure legal rights: chance decides what shall be real, what personal, and they have not a scintilla of equity to make the property that which it is not in fact. If a testator says, I desire all my money may be disposed of as land, it must be all converted into real estate, and must go as such; so, *vice versâ*, if he desires that all his land shall be turned into money, that is a direct trust, and the direction would be executed by a court of equity. I was always much struck with Lord Camden's opinion in *Flanagan* v. *Flanagan:* by a mistake of this Court, land was converted into money: more was sold than ought to have been sold; and it was contended that the Court would rectify it, and that the excess should be considered as land. But Lord Camden went upon the ground, that between real and personal representatives there was no possible equity, but they must take their rights as they find them."

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The authorities, however, do not support an application of this principle when the conversion has been effected under the direction of the immediate owners themselves; for Lord Eldon has remarked,(y) "I am *disposed to say, notwithstanding the opinion of Lord Rosslyn and some other modern authorities, that if an instrument is to be taken to impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and to put an end to that impression, it must be shown, either that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention, as to the devolution of the property upon either; and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir."

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In the case of *Thornton* v. *Hawley*,(z) the Master of the Rolls entirely concurred with the preceding expressions of Lord Eldon, and conceived that there was no weight in the circumstances of the property being found in the shape of money or land; and so, also, on subsequent occasions,(a) it has been held that the property would retain the impression given it, and so pass to the representatives, even although volunteers, until there had been some expression of intention to be gathered from the person entitled to the property; and we shall, therefore, in the

(x) 2 Ves. jun. 170.
(y) Wheldale v. Partridge, 8 Ves. 235.
(z) 10 Ves. 129.
(a) Biddulph v. Biddulph, 12 Ves. 161. Kirkman v. Miles, 13 Ves. 538.

next instance, consider what expression of intention will be looked on as sufficient to take from the property the character it has once received by the instrument directing it to be converted.

*CHAPTER VIII. [*169]

RECONVERSION OF PROPERTY.—EVIDENCE OF INTENTION TO RECONVERT PROPERTY BY PERSONS ABSOLUTELY ENTITLED.—MEANS PURSUED BY THOSE WHO HAVE ONLY QUALIFIED INTERESTS TO RECONVERT.—STATUTES FACILITATING THE MEANS OF THOSE WHO HAVE QUALIFIED INTERESTS TO RECONVERT, &c.

HAVING thus attempted to trace the various consequences attendant upon property, when under that impression which is given to it in the eye of equity, in order to accomplish the owner's purpose, and having seen that such property may pass *ad infinitum* under an impression so given, we shall, in the present chapter, examine what act will be deemed sufficiently declarative of an intention to put an end to this impression, or, in other words, to reconvert the property, and what interest in the property will be sufficient to entitle a person to make such a declaration.

Property of this description, we have seen, generally is in a state of trust; and when it is ascertained for whose benefit the trust was created, it cannot be denied that those who are the objects of the trust have the interest in the thing which is the subject of it; and, therefore, where money is given to be laid out in land, which is to be conveyed to *A.*, though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out. So, on the other hand, where land is given upon a trust to sell, and to pay the produce to *A.*, though no interest in the land is expressly *given to him, in equity he [*170] is the owner, and the trustee must convey as he shall direct.

And as the intention to convert property should be definitively and explicitly shown, so, on the contrary, we shall observe that to put an end to that impression which it may have received from such an act, the slightest expression by those absolutely entitled to the property, denoting a change as to its quality, will be quite sufficient; but, however, the *onus* of proving the reconversion lies on the party insisting on such reconversion.(*a*)

It is this slight expression of intention which serves to elucidate the case of *Chichester* v. *Bickerstaff*,(*b*) mentioned in a former chapter,(*c*) and which has been thought repugnant to the current authorities, which held that money, when impressed with the character of land, should be considered as land, and not money: but the circumstances of the case

(*a*) Stead v. Newdigate, 2 Mer. 531. (*b*) 2 Vern. 295.
(*c*) Vide chap. iv. p. 77.

show that there had been an implied declaration of intention by the absolute owner to take from the money its real qualities. It appears that Sir John Chichester, the person beneficially entitled to the realizing trust-fund in case of no issue, directed Sir Charles Bickerstaff (who was his creditor for the trust-money of 1500*l.*, and whom he appointed executor, because he was best acquainted with his personal estate,) to pay 400*l.* for the funeral expenses of his wife, then to pay all his debts, and the residue of his estate to his sister. Now, the testator's debts exceeded 600*l.*, whilst his personal estate (not including the 1500*l.* in question) did not amount to half the first mentioned sum of 400*l.*; and, therefore, as the debts could not *have been liquidated without an application of the trust-fund, it was this supposed disposition of it, which, together with the fact of Sir John's appointing his debtor executor, induced the Court to consider it a sufficient indication of intention to amount to a reconversion, and that the reversionary interest in the trust-fund was personal, and not any longer under the impression of real uses.(*d*)

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And where the person having the absolute right to money under the impression of land can be inferred to conceive himself entitled to it as money, and to have intended to dispose of it as such, it will pass as personal property; as if *A.*, being entitled to a reversionary interest in a realizing trust-fund, bequeath all the rest and residue of his personal estate and effects, of what nature or kind soever, either in possession or reversion, there being no other property to satisfy the word reversion, it was considered sufficient evidence of intention to pass the fund as money.(*e*)

And so if a testator uses the word "money" as descriptive of the fund, and has no other property to answer that description, it will be considered sufficient evidence of an intention to pass the fund. The Court, however, will not apply the expression improperly, if there is any subject to which it can properly apply; and, therefore, if a testator speaking of his personal property uses such ambiguous terms, as can be satisfied without an application of the trust-fund, the Court being compelled to follow its own construction, the fund will not pass. (*f*)

*In the case of *Lingen* v. *Sowray*,(*g*) some of the securities on which the realizing trust-fund had been invested were altered, and the money was reinvested upon other securities, with a declaration of trust for the husband, *his executors and administrators:* and although, until the death of the husband, it could not be said but that it might possibly be requisite to lay out the fund in land, for the purposes declared by the articles of marriage, yet this alteration of the securities passed the money so invested on them as personalty, and, therefore, was an indication sufficient to reconvert that part, while so much of the money as remained on the original securities passed as realty.

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In the case of *Chaplin* v. *Horner*,(*h*) *J. C.*, on his marriage, covenanted to lay out 2000*l.* (then in the hands of trustees) in the purchase of lands, to be *settled on himself and his heirs.* The marriage took effect, and there was issue thereof only the plaintiff, a daughter. Not long after the plaintiff's father died intestate; but before his death he had received 1350*l.*, part of this 2000*l.*, which on the marriage was secured on a

(*d*) 7 Bro. P. C. 555.
(*e*) Triquet v. Thornton, 13 Ves. 345.
(*f*) Biddulph v. Biddulph, 12 Ves. 161.
(*g*) 1 P. Wms. 172.
(*h*) 1 P. Wms. 483.

mortgage, and laid it out in the purchase of an office for his life: and it was held by the Master of the Rolls that the 1350*l.* ought not to be refunded by the administrator of the husband, in order to be invested in land, for the benefit of the daughter of the marriage. It must be observed, that in this case, on account of the direction to lay out the money in land to be settled on the husband in fee, that he had an absolute power of disposition over the fund from the time the covenant was entered into.

A description of the fund as so much money to be *laid out in land, by a will not attested by three witnesses, has [*173] been considered sufficient to pass it as personalty;(*i*) and Lord Macclesfield held, that even a mere parol direction to have the money continued as such, would be considered enough;(*k*) and it has been subsequently approved of: but Lord Hardwicke would not assent to go so far as that.(*l*) If, however, a parol declaration be allowed, it will only be so as between the real and personal representatives of the person entitled to the fund, and who take as volunteers; for in the case of *Chaloner* v. *Butcher*,(*m*) where a sum of money was laid out in a mortgage, and, in consideration of marriage, it was by articles agreed, that the money should be laid out in a purchase of lands, to be settled on the husband for life, remainder to the wife for life, remainder to the first and other sons successively in tail, remainder to the heirs of the husband: no purchase was ever made, and the wife died without issue; and the husband, after the wife's death, declared that the money should not be laid out in a purchase. On the death of the husband a question arose between the heir and executor as to the nature of this fund; and on the declaration of the testator being offered to be given in evidence, which was objected to on the part of the heir as being against the Statute of Frauds, the Court held, that if the question concerned the rights of a third person, no evidence should be given of the husband's declaration; but as the husband had the whole interest in *him, it was in his election whether the money should be turned into land or not; and [*174] the evidence being permitted to be read, the money was decreed for the executor.

It has been settled that the payment by the trustees of a fund characterized as real estate, into the hands of the person beneficially entitled to it, is considered a sufficient act to take from the money the impression of land. There is then no legal or equitable title out against the party who is in possession of the fund: the right and the thing centre in one person, and the action is extinguished. In the case of *Pultney* v. *Darlington*,(*n*) money impressed with the qualities of realty had come to the hands of the person entitled to it under the ultimate limitation in fee; and the person so entitled, without taking any notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in any wise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust-monies (except certain estates therein mentioned,) to his brother *H.* in fee, and gave him all the residue of his personal estate, and made him executor.

(*i*) Vide 3 P. Wms. 222, (n. c.)
(*k*) Edwards v. Countess of Warwick, 2 P. Wms. 171.
(*l*) Bradish v. Gee, Amb. 229.
(*m*) Cited 3 Atk. 685, and in Harg. M. S. collection, No. 464, A. 1.
(*n*) 1 Bro. C. C. 220, and 7 Bro. P. C. 530.

His brother *H.* subsequently, by his will, gave all his estates, by local descriptions, to certain uses therein described, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will: and the Chancellor dismissed the bill brought by the heir at law to have the money laid out in land, observing that as it was at home,(*o*) that circumstance
[*175] *was a sufficient cause to consider it in its true nature, as money, and not land. This decision was afterwards affirmed on appeal in the House of Lords.(*p*)

A singular occurrence of this implied consent to take from money the impression of land, came forward on appeal in the year 1758. By articles of marriage in 1692, a considerable sum of money was covenanted to be laid out, with convenient speed, in strict settlement; but before a proper purchase could be found, the act of the 11th and 12th of William III. c. 4. was passed, by which Papists were rendered incapable of purchasing lands for their benefit in their own names, or the names of others. The husband and wife were Catholics, and so continued until their deaths. They had several children, who all died young. The wife died in 1737, the husband in 1743, intestate, and without issue, leaving personal property amounting to considerably more than the sum covenanted to be laid out. The heir at law brought his bill to have the money laid out in land; and it appears that as the husband was not limited by the articles to any precise time for laying out the money in the purchase of lands, and the disabling statute having passed before the money was actually laid out, he could not afterwards invest the same in land to the uses specified by the articles, and as every subject is considered as giving his consent to an act of parliament, the real quality was held to be discharged from the money, and it passed to the administrator as personalty; and,
[*176] consequently, the heir's bill was dismissed: and *the decree was subsequently affirmed in the House of Lords.(*q*)

But if lands be limited to certain uses, and a sum of money be covenanted to be laid out in land, to be settled to the same uses to which the lands are subject, the suffering a recovery, or levying a fine of the lands so settled, will not be construed to amount to an indication of intention to reduce into absolute possession the money which was agreed to be laid out to the same uses. As where the sum of 10,000*l.* was by marriage-settlement agreed to be laid out in lands, and settled in like manner as lands in *K.* were settled, (which was in strict settlement,) and in the mean time, until such purchase could be found, the 10,000*l.* was to be placed out upon securities, and the interest arising therefrom to go, and be paid, to such persons as should be entitled to the rents and profits of the lands in *K.* The husband died, leaving issue one son, who being thus entitled to the lands in *K.* in tail, remainder to himself in fee, levied a fine of the lands to the use of himself in fee, and soon afterwards died without issue, and intestate: upon whose death the lands in *K.* descended to his heir at law, the plaintiff, who brought her bill to have the mortgage, upon which the 10,000*l.* had been placed out, assigned to her.

(*o*) To constitute the property being at home, within the meaning of the rules here adopted by Lord Thurlow, there must not only be *jus in re* in the absolute owner, but no other person must have any outstanding *jus ad rem.* Stead v. Newdigate, 2 Mer. 528.

(*p*) 7 Bro. P. C. 530.

(*q*) Bowes v. Earl of Shrewsbury, 5 Bro. P. C. 144.

This was opposed by the defendant, who insisted that she was entitled to the same as administratrix to her son, and that this 10,000*l.* being as yet in itself money ought, by the statute of distribution, to be divided betwixt herself, as the mother of the intestate, and his half sister. And (amongst other reasons) because the son having levied a fine of the lands in *K.*, to *the use of himself and his heirs, this had extinguished the limitations in tail created by the settlement, and had, as [*177] it were, put the settlement out of the case; and as the settlement as to the lands in *K.* was out of the case, so the trusts of the 10,000*l.*, which were to attend the settlement of the lands in *K.*, were at an end also. But the Chancellor considered that the impression of real uses had not been by such act withdrawn from the money.(*r*)

If a fund is to be laid out in land, to be settled on several as tenants in common in fee, they may at any time, on a joint or separate application to the Court, obtain payment of their respective shares into their own hands.(*s*)

When money is to be laid out in lands, to which a person will be absolutely entitled when purchased, as such person may, by the various means before-mentioned, obtain possession of the money, without an investment in land, when this election does not affect the rights of others; so, when land is to be turned into money, the person entitled to the money can elect to take the land, if it happen that the rights of others are not affected by such an election. Lord Hardwicke has said, that no election can determine the question as to those claiming under the trust, but as to those only who claim as volunteers,(*t*) and from hence it may be concluded, that if *A.* devise a real estate in trust to be sold, and direct that the money which shall arise by the sale shall be invested in the purchase of another estate to be conveyed to *B.* in fee-simple; and if *before the sale *B.* die, having bequeathed the monies [*178] to arise by the sale to *C.*, and having appointed *D.* his executor, *C.* can not, by electing to take the devised property as real estate, prevent a sale of it against *D.*, who, as executor, may require the money for payment of the testator's debts, for then the election of a volunteer would do an injustice to the creditors of *B.*, who had directed the estate to be converted.(*u*)

In the reconversion of real estate, a slight expression of intention will likewise be considered sufficient to demonstrate an election on the part of the person absolutely entitled.

In the case of *Crabtree* v. *Bramble*,(*v*) by marriage-articles, money was directed to be laid out in lands, to be settled on husband and wife for life, and after the death of the survivor to be sold, in order that the produce might be divided amongst the children of the marriage—if daughters at twenty-one, or marriage; and it was provided that no sale should be made, until one of the shares became payable. There was issue of the marriage one daughter, Elizabeth, who attained her age of twenty-one, and on the death of her mother received the rents of the land, and made leases, reserving a rent to herself, her heirs and assigns; and this act was considered as a sufficient declaration of intention that

(*r*) Edwards v. Countess of Warwick, 2 P. Wms. 171, and 1 Bro. P. C. 207.
(*s*) Seely v. Jago, P. Wms. 389. (*t*) Bradish v. Gee, Ambl. 229
(*u*) Vide Saunders on Uses, vol. i. p. 240. (*v*) 3 Atk. 680.

the land should remain as land; and the personal representative of Elizabeth was not entitled to have the land sold for his benefit, as being still personalty under the articles, even though the trustees under the settlement had never conveyed the lands to their cestuique trust: it was observed in the case of *Lingen* v. *Sowray*,(*w*) that the securities on which
[*179] the money was invested *were altered, and the new trusts declared on a reinvestment were to the husband, his *executors, and administrators;* and in the present case, leases were made, reserving a rent to Elizabeth, her *heirs and assigns*, and consequently there was the same reason to hold that the beneficial owner had done an act in this instance declarative of an intention to reconvert the property, or to take it as it was, that is as land, as in case of *Lingen* v. *Sowray*, there was to hold that the beneficial owner had done such an act as was sufficiently declarative of his intention to take the money as money: perhaps the same result might have been obtained by viewing this case under the rule stated in a preceding chapter:(*x*)—the purposes of sale were for the convenience of division amongst the children; but as there was only one daughter, those purposes were not required to be carried into effect, and the daughter took the land as land, and not money.

But the mere possession, without any act done declarative of intention, and unaccompanied by length of time, or by the fact of the trustees being called on to convey the legal estate, will not be sufficient to take from the land the character of personalty;(*y*) and if there is a stated period for sale, actual possession can afford no argument for a reconversion before the expiration of the period.(*z*) And when land is directed to be converted into money, as it is in the option of the parties entitled to keep it absolutely as land, they may, if they choose, keep it for any particular
[*180] period as land;(*a*) but *it is necessary that they should all give their consent to hold it as such, for none has a right to say that any part shall not be sold:(*b*) therefore when an estate is conveyed or devised to trustees in trust to sell, and to pay the monies to arise by the sale among several persons, it is necessary that all the cestuisque trust should concur in electing to take the original property as real estate; for none of the cestuisque trust can, against or without the consent of any one of them, prevent the sale of the estate, and consequently, where persons are beneficially entitled to the produce arising from the sale of an estate, it should appear on the title to the estate that those persons have concurred amongst themselves to take the estate as land, instead of the money to arise by the sale.(*c*)

As to the power of a feme covert over money to be laid out in land, although she will be entitled absolutely to the land when purchased, yet she cannot, by any contract or agreement during coverture, change the nature of this realizing trust-fund, so as to divest it of the impression of land;(*d*) for a feme covert has always been considered in courts of equity as under a disability to change the nature of such a fund. A fictitious purchase used sometimes to be made for that purpose, and a fine

(*w*) 1 P. Wms. 172. (*x*) Chap. vi.
(*y*) Davers v. Folkes, 1 Eq. Ca. Abr. 396. Kirkman v. Miles, 13 Ves. 338.
(*z*) Stead v. Newdigate, 2 Mer. 521. (*a*) Walker v. Shore, 19 Ves. 392.
(*b*) Bradish v. Gee, Ambl. 229, and Fletcher v. Ashburner, 1 Bro. C. C. 497.
(*c*) Saunders on Uses, vol. i. p. 239.
(*d*) Oldham v. Hughes, 2 Atk. 452. Cunningham v. Moody, 1 Ves. sen. 174.

levied of the land, and thus a power of disposition over it was gained;(e) but the most eligible means seem to have been to come into a court of *equity, and by consenting there to take the money as personal estate, and upon being examined (as a feme covert upon a fine is) as to such consent, the money agreed to be invested in land would be as much bound as the land could be by a fine at law, and if a personal appearance in Court should happen to be inconvenient, an order for an examination, in the nature of a *dedimus potestatem*, would be granted. But no payment of the money by the trustees in whose names the fund is invested, or release given them on such occasion, would be sufficient to cause this fund to be taken otherwise than as land, as neither the payment is equal to a decree, nor the release to the sole and separate examination of a feme covert declaring her free will, and therefore the equitable quality which the money had gained would not be affected by such means.(f) [*181]

Money so articled is considered barely as money at law till an actual investment, but in equity it is viewed in the light of a real estate; and a court of equity can act upon its own creature, and do what a fine at common law can upon the land;(g) therefore, where a petition was preferred in behalf of a husband and wife, that a sum of money left under a will to persons in trust for the wife and her heirs, to be laid out in the purchase of lands, might be paid to the husband instead of being invested in land, although the Lord Chancellor at first doubted whether he could direct the money to be paid to the husband notwithstanding the wife's consent, because the heir would have a chance if the wife died before the money was invested in land, yet, upon the *wife's consenting in Court, he subsequently directed the money to be paid to the husband.(h) [*182]

If, however, land is under an impression to be converted into money, there the case will be very different, and the husband will be absolutely entitled to it in right of his wife, and having this complete interest in it, the property will be subject to his debts and charges,(i) and he alone can exercise his right of election.(k)

An infant cannot by any means take from the realizing trust-fund the impression of land: he is incapable of making such election by reason of his infancy;(l) besides such an election might, were he to die during his infancy, be prejudicial to his heir; therefore in the case of *Seely* v. *Jago*,(m) where an infant was entitled with others, as tenant in common in fee, to the third of a sum of money directed to be laid out in land, although the Chancellor allowed the other two tenants in common to take their shares as money, they being of age, yet the infant's share was decreed to be brought before the Master to be put out for his benefit; and if before his age the infant become lunatic, the property will descend to his representative in its converted state.(n)

(e) Vid. Maynwaring v. Maynwaring, 3 Atk. 413, and note 2, p. 414.
(f) Cunningham v. Moody, 1 Ves. sen. 174.
(g) Oldham v. Hughes, 2 Atk. 452.
(h) Pearson v. Brereton, 3 Atk. 71.
(i) Collingwood v. Wallis, 1 Eq. Ca. Abr. 395.
(k) Oldham v. Hughes, 2 Atk. 452.
(l) Earlom v. Saunders, Amb. 241. Duchess of Buckinghamshire v. Sheffield, 3 Bro. P. C. 148. Van v. Barnett, 19 Ves. 102.
(m) 1 P. Wms. 389.
(n) Ashby v. Palmer, 1 Mer. 296.

Having thus shown that those who are absolutely entitled to property under a state of conversion may, by the slightest indication of intention, elect to take the property as it is in fact, or to reconvert it, unless such reconversion affect the rights of others whose *claims might [*183] be defeated by such an act, and having called the reader's attention to the limited power of a feme covert, and the utter inability of an infant to make such an election, we shall state what were the necessary steps by which tenants in tail, with remainders over, were compelled to proceed in order to become absolutely entitled to property when in a state of conversion: nor need we observe, that this class of cases can only arise out of money under the impression of real uses.

It appears formerly(*o*) to have been the constant practice of the Court of Chancery, that if there were covenants to purchase an estate to certain uses, and money paid over to trustees for that purpose, the Court would compel a purchase to be made to the uses, though the covenantor died before; but if the first estate was an estate-tail with remainders over, and the person to take it was living at the time of the death of him whose money it was, there the Court would not compel a purchase for the sake of the remainder, because the first tenant in tail might destroy it as soon as it was created; and the Court would not do a vain thing in ordering the money to be invested: nor does there seem to have been any variation in this practice until Lord Cowper's time, when, in a case in which money was to be laid out in land, to be settled on *A.* in tail, remainder to *B.* in tail, the Court decreed the money to be laid out in a purchase of land, and settled accordingly, to the intent that the issue in tail, and the remainder-man, might have the benefit of the chance intended them by the person creating the trust, in case the tenant in tail *should [*184] die before suffering a recovery, or levying a fine.(*p*) There is in all these cases a chance that the tenant in tail may not live till the next term, and it would, therefore, be improper to deprive a subsequent remainder-man of the benefit of this contingency; in fact, it appears in the case just alluded to, that the contingency actually happened, for the remainder-man came into possession by the death of the tenant in tail, before a recovery had been suffered: and Lord Hardwicke has observed,(*q*) that this accident of the death of the tenant in tail, before the remainder could by any possibility have been barred, showed the remainder-man's interest in so glaring a light, that it has established the precedent ever since. And in the case of *Legate* v. *Sewel*,(*r*) Lord Cowper had again occasion to reprobate the old doctrine, and to see the manifest injustice occasioned by it: in that instance, money was directed by will to be laid out in lands to be settled on *W. L.* in tail, with several remainders over. *W. L.* brought a bill in his infancy against the executor, and obtained a decree that the money should be laid out in land, and settled according to the will; but having afterwards attained his full age in the year 1690, he obtained a decree on a rehearing, that as he was to be tenant in tail of the land when purchased and settled, whereby he might bar the remainders, the money should be paid to him that he might have the disposition of it as he should think fit. Afterwards, in 1703, he died without issue, and devised all his estate, both real and personal, paying his debts, &c. The remainder-man now brought his bill against the

(*o*) Anonymous, 12 Mod. 521.
(*p*) Colwal v. Shadwell, cited 1 P. Wms. 485
(*q*) Cunningham v. Moody, 1 Ves. 174.
(*r*) 1 P. Wms. 87, and 2 Vern. 551.

*executor, complaining that in breach of trust the money was paid to *W. L.* without his concurrence, instead of being laid [*185] out in land and settled as it ought to have been; and the Court was of opinion, that the money ought not to have been decreed to him; but that the trust ought to have been strictly pursued, and the money invested in lands, and settled according to the will. But as *W. L.* lived above ten years after the first decree, and payment of the money to him, and probably had it been settled in land would in his lifetime have barred the entail, it was considered too late to fetch the money back from him.

Lord Macclesfield, alluding to the decision in *Colwal* v. *Shadwell*, said, that a court of equity, whose business it was to aid the intent of the party, ought not, in violation of such intent, to decree the payment of the money to the tenant in tail, but ought to decree it to be laid out in a purchase of land, to be settled according to the direction of the party, in order that the chance which was intended the remainder-man might be preserved; and when the settlement was made, the tenant in tail might, if he thought fit, suffer a recovery.(*s*)

Hence, as in the previous instance, the fictitious method of borrowing an estate has sometimes been resorted to in order to suffer a recovery, to bar the limitations; and the trust-fund being paid over to the supposed seller, he, on a reconveyance of the estate, paid over the fund to the person entitled under the articles.(*t*) But though this was allowed in equity, the danger of it was very considerable, for the wife of the person so *borrowing the estate may possibly become dowable of [*186] it.(*u*) But the actual investment of the money, or the fiction of borrowing an estate, was not indispensably necessary for such a tenant in tail to bar the subsequent remainders; for if the subsequent remainder-man in tail enter into an agreement with the first tenant in tail, their issue are as much barred as if part of the money had been received by the remainder-man in tail: for in the case of *Trafford* v. *Boehm*,(*v*) by marriage settlement a sum of money was agreed to be laid out in lands, to be settled on the husband and wife for their lives, and the life of the survivor, with remainder to the first and other sons of the marriage in tail male; remainder to the daughters in tail general; remainder to the husband and wife in fee. There was issue several children of the marriage. The eldest son, on his marriage, reciting that he was entitled to the money liable to the entail in his father's settlement, covenanted to assign the *money to trustees for the purpose of increasing [*187] his wife's fortune. The father afterwards made his will, by

(*s*) Short v. Wood, 1 P. Wms. 470.

(*t*) ——— v. Marsh, Easter term, 1723, cited 1 P. Wms. 485.

(*u*) In the case of Henley v. Webb, 5 Madd. 407, the husband being entitled to the sum of 14,000*l.* to be laid out in land of which he would be tenant in tail, obtained a conveyance by bargain and sale of an estate in fee from *J. W.* On the same day he conveyed the estate by lease and release to the trustees of the 14,000*l.* in consideration of that sum, which was also the price paid to *J. W.* He then suffered a recovery of the estate, being equitable tenant in tail under the trustees; and having thus obtained the fee-simple of the estate, he reconveyed it to *J. W.* for the same sum for which he had purchased it; having in fact entered into an agreement with *J. W.* that he would do so before the bargain and sale made to him, the intent of the transaction being to make himself master of the 14,000*l.*; and although it was attempted to be shown that the husband was then only a trustee for *J. W.* yet it was held, that the wife's right to dower attached upon it when in possession of the husband, as absolute owner paramount to his character of trustee, and he could afterwards only deal with it subject to dower.

(*v*) 3 Atk. 440.

which he gave this sum of money, which he then had in his hands, to his eldest son, and several other sums and legacies to his other children, and declaring, that as he had given them more than they were entitled to by the custom of London, desired, that upon payment of every legacy a full discharge to his executors should be given; and in case of refusal, the child so refusing should only have so much of his estate as, by the custom, such child might be entitled to. On the death of the testator, the eldest son received the sums, and gave a discharge to the executors for the same. He afterwards died without issue, leaving his wife surviving. The only child of his next brother (who had likewise given a discharge to his father's executors, and thereby had consented to the disposition of the trust-fund, as arranged between the father and eldest son,) was his heir, and the question was, whether the money agreed to be laid out on the father's marriage was a debt on the estate of the eldest son, who dying without issue, the money ought to be laid out for the benefit of the brother's child, as claiming under the father's settlement, or whether the acts which had been done, viz. the covenant in the son's settlement to lay it out for the increase of his wife's fortune, the disposition of the reversionary interest in it by the father's will, and the actual agreement to this disposition, which was made by the receipts given by the legatees to discharge the executors, were sufficient to indicate an intention to show, that as well the first tenant in tail, as the subsequent remainder-men, had agreed to discharge this money from the real quality which had been given it; and the Lord Chancellor considered that the eldest son

[*188] *had done quite sufficient to show his election to have it as money; that it was not, therefore, liable to any entail, or to be considered as a debt on the estate of the eldest son, for the benefit of the remainder-men under the father's settlement.

Here it must be observed the brothers had given their consent by the receipt of the legacies, and discharge of the trustees. The act done by the eldest brother was decisive that he took it as money; and the issue of the brothers were as much barred by their agreement to it as if they had come into a court of equity, and had, by the answers to their brother's bill to have the money paid him as money, submitted that it might be so paid.

And so in a case which occurred soon afterwards, where money was by articles agreed to be laid out in strict settlement, upon the application of the first tenant in tail to have the money paid over to him, and his brothers and sisters appearing in Court and consenting, the Lord Chancellor ordered the securities on which the money was invested to be assigned to him, together with the interest which had accrued thereon.(*w*) And if the subsequent remainder-men had once entered into such an agreement, though the tenant in tail die before the execution of it, nevertheless, his executors would be enabled to compel the remainder-men to a specific performance of it. As where(*x*) *A.* devised 8000*l.* to be laid out in land, and settled to the use of *B.* in tail, remainder to *C.* in fee: *B.* and *C.* agreed by articles in writing to divide the money in the

[*189] manner therein *mentioned. *B.*, the tenant in tail, died without issue soon after the making of the articles, and before

(*w*) Collet v. Collet, 1 Atk. 11, mentioned also in the Harg. MSS. No. 84, 436, as Collet v. Bain.

(*x*) Carter v. Carter, Forr. 271.

they were executed by a division of the money. It came before the Court by way of appeal from the Rolls, where a specific performance of the articles was decreed in favour of the executor or administrator of *B.*; and the Lord Chancellor said, that this was a mutual agreement between the parties to have the money divided between them, and there were no children of tenant in tail *in esse;* and although the tenant in tail had died before anything was done in pursuance of the articles, yet everything might be done then as well as it might in his lifetime, and the decree was affirmed.

And it seems also, that the ultimate remainder-man could procure the trust-fund to be paid over to him, on the consent of the previous tenants in tail being procured.(*y*)

It sometimes occurs, that instead of a specific sum being agreed to be laid out in lands, there is a covenant to purchase lands of a certain yearly value, to be settled in strict settlement; and if the first tenant in tail apply to the Court to have the money in lieu of the lands to be purchased, a question arises as to the amount of the sum which the Court ought to decree as an equivalent for the land. And it appears in a case reported by Mosely, where the husband by articles previous to his marriage covenanted to purchase lands of 80*l.* per annum in trust for the issue of that marriage as tenants in common in tail, remainder to himself in fee, that a decree was made that he should perform the articles, but dying before the performance, the children joined in a petition *to have the money paid to them, and not invested in a purchase, and an [*190] order was made accordingly; but the question was, at what price the purchase should be settled? And the Master of the Rolls was of opinion that since the Court had decreed an execution of the trust, they would likewise see that it should be performed in a reasonable manner; and he, therefore, ordered the petitioners to be paid after the rate of twenty-four years' purchase, which was the average value of the land in the county in which the parties lived; but he did not give them the interest of that sum from the death of the covenantor, but only allowed the 80*l.* per annum.(*z*)

But when a person was tenant in tail with reversion to himself in fee of money to be laid out in land, it still continued to be the practice of the Court to allow the money to be paid to the person so entitled upon a proper application: for it was said,(*a*) a fine could not be levied of money agreed to be laid out in the purchase of land to be settled in tail: but a decree could bind such money equally as a fine alone could have bound the land in such case if bought and settled: and as such person would have the entire interest in the lands when purchased and settled, and the absolute power over them, and that a court of equity would not do so vain a thing as to decree a purchase and settlement to be made, which the next moment by a fine only might be cut off, the money might be paid over.

So where(*b*) money was directed to be laid out in land, and settled upon a woman for life, remainder to her *first, &c., son in tail, remainder to such son in fee, the widow and son (there [*191]

(*y*) Calthorpe v. Gough, 18th Feb. 1789, cited 3 Bro. C. C. 395, and 4 T. R. 707.
(*z*) Badger v. Badger, Mos. Rep. 117. (*a*) Benson v. Benson, 1 P. Wms. 130.
(*b*) Short v. Wood, 1 P. Wms. 470.

being only one son) came to an agreement that this money should be paid, a third to the mother, and two-thirds to the son, and brought a bill against the trustees to pay it, who submitted it to the Court; and it was held, that in such a case where the limitations might be barred by a fine, which might be levied at any time, it would be in vain for equity to decree a settlement, and the Chancellor, therefore, directed the trustees to pay the money according to the agreement.

But when Lord King held the seals in 1726, his Lordship considered the doctrine established by Lord Cowper, in *Colwal* v. *Shadwell*, as equally applicable to the case of tenant in tail, with reversion to himself in fee, and would not acknowledge the uniform practice of paying over the money into his hands, on application to the Court; for, said his Lordship, "I cannot see why I should not have the like regard for the issue in tail as for the remainder-man: it is possible for him, in such a case, before he can procure a purchase and settle it, to die, leaving issue; and this is a chance of which I would not deprive such issue. There may also be a wife, whom I may deprive of her dower."(*c*) And although the matter was much pressed upon the old doctrine, yet the Chancellor declared he would not do it, until he should be better satisfied from precedents; and he afterwards declared his perseverance in opinion as to this point, observing, that the levying of a fine was a thing of time, there being *several offices to pass; and the writ of covenant was to be under the great seal, which impediments not being to be removed in an instant, the tenant in tail might by them be prevented from perfecting a fine, though never so much intended by him.(*d*)

[*192]

But after the time of Lord King, the old practice as to tenants in tail with the immediate remainder in fee was again revived; for we find Lord Hardwicke laying it down, as the established rule of the Court, that if a person is tenant in tail, with reversion to himself in fee, the Court will give him the money, because he may at any time bar the entail and reversion; and, therefore, the Court will not put him to the circuity of having recourse to a legal bar:(*e*) and so again, in *Cunningham* v. *Moody*,(*f*) it was expressly laid down, that where the remainder can be barred by a fine, the Court would decree it in money.

And if the tenant in tail of money so circumstanced is a feme covert with reversion to herself in fee, she could likewise, by coming into Court and consenting, gain the absolute disposition over the fund: but, as in all other instances, a court of equity would not allow the money to be paid over to her absolutely, without an inquiry whether or not any settlement had been made on her by her husband.(*g*)

Here we may observe, that in the instance of money to be laid out in lands to be settled in strict settlement, when the money is laid out under the provisions of the Land-Tax Redemption Acts in the purchase of land-

(*c*) It appears, however, that this would not altogether have been the case: the Court would not pay the money into the husband's hands without a settlement on the wife. Binford v. Bawden, 1 Ves. jun. 512.

(*d*) Eyre's case, 3 P. Wms. 13.

(*e*) Trafford v. Boehm, 3 Atk. 447.

(*f*) 1 Ves. sen. 174.

(*g*) Cunningham v. Moody, 1 Ves. sen. 174. Binford v. Bawden, 1 Ves. jun. 512.

tax,(*h*) *it is necessary, in order to bar the entail, that it be effected by deed, enrolled and registered according to the form prescribed by the act.(*i*) [*193]

But to return to the means by which money impressed with the character of realty may be reduced into absolute possession by any tenant in tail, when not laid out, they have now been expressly defined by act of Parliament,(*k*) to which we shall here call the attention of the reader.

The act, after reciting that by the practice of courts of equity, in cases in which money under the control of such courts is subject to be laid out in the purchase of lands, to be limited to uses capable of being barred by fine, the said courts direct such money to be paid to the party or parties who could, by fine, bar the uses to which such lands, in case the same had been purchased, would have been limited, and do not require or compel the actual investment of such monies in the purchase of lands, notwithstanding other persons might take estates or interests therein, if the same were purchased, and be entitled to hold such estates or interests until such fine was actually levied; and that where money under the control of the said courts is subject to be invested in the purchase of lands, to be limited to uses not capable of being barred by fine, but capable of being barred by recovery, the said courts, according to the practice thereof, refuse to direct the same to be paid to the party or parties who, in case such lands had been purchased, could, by recovery, have barred all the uses to which the same would have been limited, and require and compel the actual investment of such monies in a *purchase or purchases of some lands; and such last-mentioned practice is attended with great inconvenience and expense to the party or parties who, by a recovery, could bar the uses to which such lands are to be limited when purchased; and the interest and benefit of others, who might take estates barrable by such recovery, when suffered, is not, according to such last-mentioned practice, materially promoted or secured; and that it might, therefore, be expedient to alter such practice, and to provide some satisfactory and summary proceeding, whereby trustees possessed of money, subject to be laid out in lands, might be required, in proper cases, to pay such money to the parties entitled, and to become entitled to receive the same, enacts, "That, from and after the passing thereof, in all cases where money, under the control of any court of equity or of or to which any individuals, as trustees, are possessed or entitled, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, to be settled upon any person or persons in such manner that it would be competent, in case such money had been invested in the purchase of real estates, for the person or persons who would be the tenant or tenants of the first estate, or estates-tail therein, either alone or together, with the person or persons who would be the owner or owners of the particular preceding estate or estates therein, if any, by deed, fine, or common recovery, or any of them, or other lawful act, in the case of freehold hereditaments, or by surrender and recovery, or either of them, or other lawful act, in the case of copyhold hereditaments, to bar the first estate or estates-tail, and the rights and interests of all persons in remainder, it shall not be necessary to have [*194]

(*h*) 38 G. 3. c. 60. (*i*) 58 G. 3. c. 30, s. 40. (*k*) 40 G. 3. c. 56.

[*195] such *money actually invested in lands or hereditaments, in order that such estates tail and remainders over may be so barred; but that it shall and may be lawful to and for the High Court of Chancery, or such court of equity under the control of which such money shall be, and in the case of trustees, to and for the said High Court of Chancery, in a summary way, *upon petition of the person or persons who would be tenant or tenants of the first estate, or first estates-tail*, and of the person or persons who would be the owner or owners of the antecedent particular estate or estates, if any, in the lands and hereditaments, in case the same were purchased, such petitioners being adults; and in case where any of the parties are or is femes covert or a feme covert, they, she, or they being first separately examined in Court, or upon a commission, and consenting, to order the monies subjected to such trusts to be paid to the petitioners, or any of them, or to be paid and applied in such manner and for such purposes as the petitioners shall appoint, and the Court shall approve of."

"And that in all cases where monies subjected to be laid out in the purchase of hereditaments to be settled as aforesaid shall happen to be invested in government, or real, or other securities, all such securities shall, for the purposes of this act, be considered as money, and shall and may accordingly be transferred, assigned, and disposed of, under an order of the respective courts aforesaid, made in a summary way, *upon the petition of such persons*, and with such examination and consent, where necessary, as aforesaid, in such and the same manner as monies subjected

[*196] to be laid out in the purchase of hereditaments, to be *settled as aforesaid, are hereinbefore authorized to be paid, applied, and disposed of."

A similar act was passed in the 58 Geo. III.,(*l*) for the benefit of persons entitled to entailed estates to be purchased in Ireland: the wording of the acts is precisely the same, and the construction of the one must, therefore, be that of the other.

The effect of the 48 Geo. III. c. 56, is not to destroy the chance of any remainder-man; for upon a petition(*m*) out of term-time, under the act by the tenant for life, and the first of several tenants in tail in remainder, Lord Rosslyn said, he had consulted Lord Kenyon, Lord Eldon, and the Master of the Rolls, as to the manner in which the act should be executed, and they had agreed that it would not be proper to order the money to be paid out of Court until such time as the tenant in tail might actually have suffered a recovery of the lands; and although he made the order, yet he directed that it should have no effect unless the tenant in tail should be living on the second day of the next term.

The same construction which had been put upon the act by Lord Rosslyn was adopted by Lord Eldon in a similar petition,(*n*) the following year: and where land had been sold under an act of Parliament directing the money arising from the produce to be invested until laid out in land to be settled in the same way, Lord Alvanley, after a direction as to an inquiry whether there were any incumbrances affecting the fund, ordered,

[*197] on petition, the money to be paid into the hands of the *first tenant in tail, provided he was living on the second day of

(*l*) Cap. 46.
(*m*) Lowten v. Lowten, cited 5 Ves. 12, (*n*).
(*n*) Ex parte Bennet, and Ex parte Dolman, 6 Ves. 116.

the following term. Before the money is paid over it is impossible to dispense with a reference to the Master, to inquire whether the parties petitioning have in any manner incumbered their interests in the money, and without such reference the party cannot obtain possession of the fund.(*o*)

But the Court has no jurisdiction under this act, except upon the petition of the parties: an application cannot be made by motion; for as this is not a rule laid down by the Court itself, which the Court may have power to dispense with, but an act of Parliament which has directed the application to be by petition, the Court has no jurisdiction, except in the mode prescribed; therefore, where there was a sum of money on a marriage, covenanted to be laid out in real estate, and settled on the children as tenants in common in tail, two of whom petitioned under the act to prevent the necessity of suffering a recovery, and the other children applied by motion to have the benefit of their petition, the Lord Chancellor objected, and said, that each party must petition, as the Court had not jurisdiction to set aside the mode prescribed by the act of Parliament.(*p*)

It would likewise appear, that as the act directs the money to be paid over *in all cases upon petition of the parties*, that although before the act a court of equity had not jurisdiction to order the money to be paid upon petition, when that money was ordered to be invested by a private act of Parliament, but required a bill to be filed,(*q*) yet at present the Court would be *enabled to pay the money over simply upon the petition of the party, if otherwise properly entitled. [*198]

Lastly, it may be remarked, that when lands are given to trustees, in trust to sell, and with the produce to raise a fund to be laid out in lands, to be settled to uses in strict settlement, if it so happen that the tenant in tail has the immediate reversion to himself in fee, he may, by levying a fine of those lands, obtain the complete ownership of them, so as to make a good title, although no uses have been limited to him in the lands, nor any equitable interest expressly given; for as the equitable interest in the estate must reside somewhere, and as the trustees are not the beneficial owners, there must be some cestuique trust, and as in reason there cannot be any difference whether the benefit to the cestuique trust arising from the sale is given to him in one way or another, whether in the shape of money to be produced by the sale, or of other land to be purchased with that money, the beneficial interest, though not expressly given, yet does in fact belong to the cestuique trust, and consequently by a fine levied by him under such circumstances he would gain the equitable fee, and then the trustees are compellable to convey the legal estate. Such a fine would, in fact, amount to an election by the cestuique trust, not only to bar the entail, but to retain the original estate, and sufficient to make a title to it; therefore, where a copyhold estate was directed to be sold, and an estate of freehold to be purchased and settled on *A.* in tail, with remainder to himself in fee, he was considered the equitable owner of the copyhold, and the legal estate was directed to be surrendered.(*r*) In the

(*o*) Ex parte Hodges, 6 Ves. 576. Ex parte Frith, 8 Ves. 609.
(*p*) Baynes v. Baynes, 9 Ves. 462. (*q*) Ex parte King, 2 Bro. C. C. 157.
(*r*) Gwyder v. Campbell, cited 17 Ves. 105.

[*199] case of **Pearson* v. *Lane*,(*s*) lands were conveyed to trustees in fee, upon trust, to sell, and after the payment of certain charges, to lay out the surplus in the purchase of other estates, to be conveyed to the trustees, to the use of the trustees for fifty years, if *W. J.* should so long live; remainder to *W. J.* for life; remainder to trustees to preserve, &c., remainder to the first and other sons of *W. J.* in tail; remainder to the use of all and every the daughters of *W. J.* as tenants in common in tail, with cross-remainders in tail; remainder to *W. J.* in fee. *W. J.* died, leaving two daughters his only issue, and no sale was ever made pursuant to the trusts; but the charges were duly paid. The daughters of *W. J.* having married, their husbands respectively covenanted to levy fines of their wives' undivided moieties to the use of the trustees and their heirs; upon trust to convey, settle, and assure the same upon the several uses and trusts, &c., declared by their respective marriage settlements; and on the question whether those claiming under the respective settlements of the daughters of *W. J.* could make a good title to the lands, it was held that, being tenants in tail, with reversion to themselves in fee, the daughters had a power of election to take the lands in lieu of the estates directed to be purchased; and that the fines operating as an election on their parts respectively, to take the undivided moiety of the lands in lieu of the estates directed to be purchased, and having likewise barred the entails, they had acquired beneficial interests in the fee-simple respectively, and consequently the trustees being from that moment compellable to convey, an unexceptionable title could be made.

[*200] *Unless, however, the estate-tail has been barred, it appears questionable whether it is not a breach of trust, if the trustees take upon themselves to convey in fee to those who are only entitled as tenants in tail.(*t*)

And a power of appointment given over estates directed to be purchased with the money arising from the sale of other estates, will be upheld in equity, as well executed by an appointment operating immediately over the original estates.(*u*)

(*s*) 17 Ves. 101.
(*t*) Per Sir Wm. Grant, M. R. 17 Ves. 106.
(*u*) Standen v. Standen, 2 Ves. jun., 589. Bullock v. Fladgate, 1 V. & B. 471.

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The pages referred to are those between brackets, [ ].

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THE END.